LEEDS POLYTECHNIC
LIBRARY

LEEDS POLYTECHNIC

FOR REFERENCE USE IN
THE LIBRARY ONLY.

LEEDS BECKETT UNIVERSITY
LIBRARY
DISCARDED

71 0278555 0
TELEPEN

THE LAW REPORTS

[1925] 1 King's Bench

ISBN 0 406 09326 1

This compilation

© The Incorporated Council of Law Reporting
for England and Wales
and
Butterworth & Co. (Publishers) Ltd.
1974

Reprinted by photolitho in Great Britain by
Compton Printing Ltd., London and Aylesbury

Digitized by the Internet Archive
in 2024

https://archive.org/details/lawreportskingsb0001unse_p3r6

This Reprint of
THE LAW REPORTS
is published in collaboration with
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
by
BUTTERWORTH & CO. (PUBLISHERS) LTD.
88 KINGSWAY
LONDON WC2B 6AB

NOTE. This Reprint is a photographic reproduction of the original volume apart from the Tables of Cases, Statutes and Statutory Instruments and the Subject Index, which are omitted in view of the facilities provided by modern text books and other works of reference

1925.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

Court of Appeal	W. H. GRIFFITH, J. F. CLERK,	*Barristers-at-Law.*
King's Bench, Court of Criminal Appeal; Appeals from County Courts, and Railway and Canal Commission Cases.	J. S. HENDERSON, R. F. STUBBING, J. RITCHIE, W. L. L. BELL, F. PORTER FAUSSET, FITZROY COWPER,	*Barristers-at-Law.*

1925.—VOL. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

LEEDS POLYTECHNIC
113638
SV
44560
4.4.74
S344.4207
710 278555 0

JUDGES

OF

THE COURT OF APPEAL.

1925.

Viscount CAVE, Lord Chancellor.

Lord HEWART, Lord Chief Justice of England.

Sir E. M. POLLOCK, Master of the Rolls.

Sir J. ELDON BANKES,
Sir T. ROLLS WARRINGTON,
Sir T. E. SCRUTTON,
Sir J. R. ATKIN,
Sir C. H. SARGANT,
} Lords Justices of the Court of Appeal.

Lord MERRIVALE, } President of the Probate, Divorce, and Admiralty Division.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1925.

Lord Hewart, Lord Chief Justice of England, President.
Sir Horace Edmund Avory.
Sir Thomas Gardner Horridge.
Sir Charles Montague Lush.
Sir Sidney Arthur Taylor Rowlatt.
Sir Montague Shearman.
Sir John Sankey.
Sir Henry Alfred McCardie.
Sir Arthur Clavell Salter.
Sir Alexander Adair Roche.
Sir Frederick Arthur Greer.
Sir Rigby Philip Watson Swift.
Sir Edward Acton.
Sir G. A. H. Branson.
Sir G. J. Talbot.
Sir F. D. MacKinnon.
Sir H. Fraser.
Sir W. Finlay.

ATTORNEY-GENERAL :

Sir Douglas M. Hogg.

SOLICITOR-GENERAL :

Sir Thomas W. H. Inskip.

ERRATA.

Page.	*Line.*	*For.*	*Read.*
148	footnote (1)	9 H. L. C. 590	9 H. L. C. 598
502	10	1872	1801 as in note
537	foot-note (1)	A. C. 127	[1895] A. C. 127
,,	foot-note (2)	A. C. 6 Q. B. 56	L. R. 6 Q. B. 56
569	17	Barnson J.	Branson J.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1925, will be as follows:—

In the First Series,
[1925] Ch.

In the Second Series,
[1925] 1 K. B. [1925] 2 K. B. [1925] P.

In the Third Series,
[1925] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Abrahams, Schneiders & Sons *v.*	(C. A.)	301
Abrahart *v.* Webster	(C. A.)	563
Allard *v.* Selfridge & Co.		129
Aramayo Francke Mines, Ecott *v.*	(C. A.)	86
Ashworth Partington & Co., Spencer *v.*	(C. A.)	589
Atherton *v.* British Insulated and Helsby Cables	(C. A.)	421
Attorney-General *v.* Avelino Aramayo & Co.	(C. A.)	86
Avelino Aramayo & Co., Attorney-General *v.*	(C. A.)	86
——— *v.* Ogston	(C. A.)	86

B.

Back *v.* Daniels	(C. A.)	526
Baldry *v.* Marshall	(C. A.)	260
Bastin, Key *v.*		650
Bath Compensation Authority, Rex *v.*	(C. A.)	685
Bayley *v.* Walker		447
Beal, Ilford Urban Council *v.*		671
Birkett, Weber *v.*		720
Board of Trade, Commercial and Estates Co. of Egypt *v.*	(C. A.)	271
Bolckow, Vaughan & Co., Peart *v.*	(C. A.)	399
Boswell *v.* Crucible Steel Co.	(C. A.)	119
Bradshaw Williams Deacon's Bank *v.*		442
Braithwaite, Lapish *v.*	(C. A.)	474
Brighton College *v.* Marriott	(C. A.)	312
British Insulated and Helsby Cables, Atherton *v.*	(C. A.)	421
Brocklebank, Ld. *v.* The King	(C. A.)	52

C.

Camden (Marquis), Ex parte. Rex *v.* Powell		641
City of London Assessment Committee, Rex *v.* Ex parte Lovell		185

		PAGE
Clover Clayton & Co. *v.* Hessler & Co.	(C. A.)	1
Cohen, Lask *v.*		584
Colquhoun, Ricketts *v.*	(C. A.)	725
Commercial and Estates Co. of Egypt *v.* Board of Trade	(C. A.)	271
Crucible Steel Company, Boswell *v.*	(C. A.)	119
Curtis, Rowntree & Co. *v.*	(C. A.)	328
Cutting Brothers, Heaton and Dugard, Ld. *v.*		655

D.

Daniels, Back *v.*	(C. A.)	526
Davis, Gunter *v.*		124
Diggines, Hartland *v.*	(C. A.)	372
Diment *v.* Roberts	(C. A.)	9

E.

Eccott *v.* Aramayo Francke Mines	(C. A.)	86
Eppner, Joy *v.*		362

F.

Firman *v.* Royal		681
Fisher's Executors, Inland Revenue Commissioners *v.*	(C. A.)	451
Fishwick *v.* Gyani		617
France (William), Fenwick & Co., Pudney *v.*	(C. A.)	346

G.

Geen, Jones *v.*		659
Gibbons, Regent's Canal and Docks Co. *v.*		81
Grant, Preston *v.*		177
Gunter *v.* Davis		124
Gyani, Fishwick *v.*		617

H.

		PAGE
Hale, Salford Corporation *v.*	(C. A.)	503
Hales, Pringle *v.*	(C. A.)	573
Hallahan, Phillips *v.*		756
Hambrook *v.* Stokes Brothers	(C. A.)	141
Harding, Parry *v.*		111
Hartland *v.* Diggines	(C. A.)	372
Heaton and Dugard, Ld. *v.* Cutting Brothers		655
Henning, Whelan *v.*	(C. A.)	387
Hessler & Co., Clover Clayton & Co. *v.*	(C. A.)	1
Hornsby *v.* Maynard		514
Hothersall, Kayley *v.*	(C. A.)	607
Hudson, Rodbourn *v.*		225

I.

Ilford Urban Council *v.* Beal		671
Inland Revenue Commissioners *v.* Fisher's Executors	(C. A.)	451

J.

Jarvis *v.* Surrey County Council		554
Jones *v.* Geen		659
Joy *v.* Eppner		362

K.

Kayley *v.* Hothersall	(C. A.)	607
Key *v.* Bastin		650
Knight *v.* Ponsonby	(C. A.)	545

L.

Lancashire Justices, Rex *v.* Ex parte Tyrer		200
Langley, Rossiter *v.*		741
Lapish *v.* Braithwaite	(C. A.)	474
Lask *v.* Cohen		584
——, Salter *v.*		584
Leach & Co., Smith *v.*	(C. A.)	346
Leconfield (Lord), Thornely *v.*	(C. A.)	236

PAGE

Lipovitch, Russoff *v.* (C. A.) 628
London County Council, Mills *v.* 213
Lovell, Ex parte. Rex *v.* City of London Assessment Committee 185

M.

Marriott, Brighton College *v.* (C. A.) 312
Marshall, Baldry *v.* (C. A.) 260
Martin, Smith *v.* (C. A.) 745
Maynard, Hornsby *v.* 514
Mills *v.* London County Council 213
Morgan, Rex *v.* (C. C. A.) 752
Muller (W. H.) & Co. *v.* Trinity House (Deptford Strond) 166

O.

Ogston, Avelino Aramayo & Co. *v.* (C. A.) 86

P.

Parry *v.* Harding 111
Paul, Rex *v.* (C. C. A.) 77
Peart *v.* Bolckow, Vaughan & Co. (C. A.) 399
Phillips *v.* Hallahan 756
Phipps & Co. *v.* Rogers (C. A.) 14
Pinto & Co., Wilcock *v.* (C. A.) 30
Ponsonby, Knight *v.* (C. A.) 545
Powell, Rex *v.* Ex parte Marquis of Camden 641
Preston *v.* Grant 177
Pringle *v.* Hales (C. A.) 573
Pudney *v.* France (William), Fenwick & Co. (C. A.) 346

R.

Regent's Canal and Docks Co. *v.* Gibbons 81
Rex *v.* Bath Compensation Authority (C. A.) 685

PAGE

Rex, Brocklebank, Ld. *v.* (C. A.) 52
—— *v.* City of London Assessment Committee. Ex parte Lovell 185
—— *v.* Lancashire Justices. Ex parte Tyrer 200
—— *v.* Morgan (C. C. A.) 752
—— *v.* Paul (C. C. A.) 77
—— *v.* Powell. Ex parte Marquis of Camden 641
—— *v.* Smith (C. C. A.) 603
Ricketts *v.* Colquhoun (C. A.) 725
Roberts, Diment *v.* (C. A.) 9
Rodbourn *v.* Hudson 225
Rogers, Phipps & Co. *v.* (C. A.) 14
Rossiter *v.* Langley 741
Rowntree & Co. *v.* Curtis (C. A.) 328
Royal, Firman *v.* 681
Russoff *v.* Lipovitch (C. A.) 628

S.

Salford Corporation *v.* Hale (C. A.) 503
Salter *v.* Lask 584
Schneiders & Sons *v.* Abrahams (C. A.) 301
Selfridge & Co., Allard *v.* 129
Smith *v.* Leach & Co. (C. A.) 346
—— *v.* Martin (C. A.) 745
—— Rex *v.* (C. C. A.) 603
Spencer *v.* Ashworth Partington & Co. (C. A.) 589
Steel (Crucible) Co., Boswell *v.* (C. A.) 119
Stokes Brothers, Hambrook *v.* (C. A.) 141
Surrey County Council, Jarvis *v.* 554

T.

Thornely *v.* Leconfield (Lord) (C. A.) 236
Trinity House (Deptford Strond), Muller (W. H.) & Co. *v.* 166
Tyrer, Ex parte. Rex *v.* Lancashire Justices 200

W.

		PAGE
Walker, Bayley *v.*		447
Weber *v.* Birkett		720
Webster, Abrahart *v.*	(C. A.)	563
Whelan *v.* Henning	(C. A.)	387
Wilcock *v.* Pinto & Co.	(C. A.)	30
Williams Deacon's Bank *v.* Bradshaw		442

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1924
March 11.

CLOVER CLAYTON AND COMPANY, LIMITED *v.* HESSLER AND COMPANY.

[1923. C. 2306.]

Practice—Third Party—Damage to Ship—Repairs—Action for Work done—Marine Insurance—Loss within Policy—Indemnity—Rules of Supreme Court, Order XVI., *r.* 48.

Ship repairers brought an action against the managers of a steamer to recover a disputed balance of an account for work and labour done by them at the request and on the order of the managers in repairing damage done to the steamer. The managers served a third party notice under Order XVI., r. 48, of the Rules of the Supreme Court, upon the owners of the steamer on whose behalf they had given the order for the work. The damage to the steamer was caused by a marine risk against which the owners were insured by a policy of insurance.

C. A.

1924

CLOVER CLAYTON & Co. v. HESSLER & Co.

The owners applied for leave to serve a third party notice on the underwriters alleging that they were entitled to indemnity from them:—

Held, that the owners were not entitled to indemnity within the meaning of Order XVI., r. 48, against the underwriters, and that they could not invoke the third party procedure, because a contract to insure a person against damage to a subject matter is not a contract to indemnify him against claims that may be made upon him in relation thereto.

The underwriters' surveyor was present throughout the execution of the work advising and directing the operations and approving them and the charges made:—

Held, that the facts did not warrant the inference that the owners were the agents of the underwriters to order the repairs, or that the underwriters through their surveyor agreed to pay the charges.

Order of Roche J. affirmed.

APPEAL from an order of Roche J. in chambers refusing leave to serve a third party notice upon underwriters of a policy of marine insurance in the following circumstances.

The plaintiffs were dock owners and ship repairers at Liverpool. The Swift Steamship Co., Ld., were the owners and the defendants, Messrs. Hessler & Co., were the managers of the steamship *Harald Casper*. The steamer was insured against marine risks for a period of twelve months from July 11, 1920, to July 10, 1921, with certain underwriters, including the British and Foreign Marine Insurance Co., Ld. (hereinafter called "the insurance company"), under a policy of insurance dated July 2, 1920. During the currency of the policy—namely, on September 11, 1920—the steamer grounded in the Gulf of Finland and thereby suffered damage through perils insured against. The defendants gave notice to the insurance brokers who in turn gave notice to the insurance company. The steamer proceeded to Liverpool where she was docked in the plaintiffs' dock in order that the nature and extent of the damage might be ascertained and the necessary repairs decided upon.

On November 2, 1920, the steamer was inspected by Mr. J. Grundy, a Lloyd's surveyor, in the presence of Mr. R. H. Emmerson, the agent for the defendants. It was found that extensive and immediate repairs were necessary. The plaintiffs were willing to do these repairs on a quantum meruit according to the time expended and the materials

used with a percentage added for establishment charges and profit, and this method of computing their remuneration was agreed to. The plaintiffs accordingly undertook the work, which occupied them from the beginning of November till the middle of December, 1920.

The affidavit of Mr. Charles Harrison, the secretary of the owners, stated that Mr. Grundy representing the underwriters agreed to the method of remuneration and approved of the work being placed in the plaintiffs' hands, and continued in these words: "Upon such agreement and approval Mr. Emmerson, representing the owners $\frac{\text{and}}{\text{or}}$ managers of the steamer, gave the requisite instructions to the plaintiffs to put the work in hand. In giving these instructions Mr. Emmerson acted solely upon the agreement and approval of Mr. Grundy mentioned above and upon the undertaking of Mr. Grundy implied by the agreement and approval that the underwriters, for whom he acted as aforesaid, would pay the cost of repairing and making good all damage to the steamer consequent upon or incidental to the stranding. If Mr. Grundy had stipulated that the steamer should be placed in other hands than the plaintiffs' the steamer would have been so placed. In giving such instructions (through their representative, Mr. Emmerson) to the plaintiffs the owners $\frac{\text{and}}{\text{or}}$ managers of the steamer acted impliedly as agents of the underwriters who, by virtue of the agreement and approval of Mr. Grundy, were responsible for the cost of the repairs.

"In accordance with the instructions referred to the work of repairing the steamer was proceeded with by the plaintiffs and extended from October 30, 1920, to December 17, 1920. Throughout the whole of this time Mr. Grundy was in constant attendance upon the steamer inspecting the works of repair and approving the manner in which it was to be carried out. Mr. Emmerson was also in daily attendance, but no instructions with regard to the repair of the damage referred to were given by him to the plaintiffs until he had obtained the approval of Mr. Grundy. The approval and instructions were given verbally from time to time while the work was in progress."

C. A. 1924

CLOVER CLAYTON & CO. v. HESSLER & CO.

It was alleged by the plaintiffs, but denied by Mr. Grundy, that the work took longer than was necessary owing to his instructions concerning the method of repairing the top of the engine-room tank. However that may be, in order to expedite the work Mr. Emmerson on behalf of the defendants and owners decided to ask the plaintiffs to work overtime on the repairs to the tank top.

Mr. Harrison's affidavit proceeded as follows: "On the completion of the repairs Mr. Grundy, Mr. Emmerson, and Mr. Oldham representing the plaintiffs, met at the plaintiffs' office, and the details of the work executed upon the vessel were gone through and all the work consequent upon the stranding was again approved by Mr. Grundy as being for the underwriters' account, and certain upkeep repairs which had been ordered by Mr. Emmerson were passed by him as being for account of the owners or defendants. The only question left outstanding was in respect of the division of overtime on the work on the engine-room tank top, and this was left over for further investigation and subsequent approval."

The total cost of the repairs executed by the plaintiffs together with the incidental expenses paid by the plaintiffs amounted to 12,381*l.* 1*s.* 9*d.* The defendants had paid 11,188*l.* 1*s.* 9*d.* The actual cost of repairing the engine-room tank top amounted to 3569*l.* 18*s.* 5*d.* From this sum Mr. Grundy had deducted the sum of 2121*l.* for overtime and had paid the plaintiffs the balance of 1448*l.* 18*s.* 5*d.* The plaintiffs contended that he ought only to have deducted 928*l.* and ought to have paid 2641*l.* 18*s.* 5*d.* Accordingly they claimed the sum of 1193*l.*, and for this sum they brought an action against the defendants as being the balance due to them for work done and materials supplied on the order of the defendants. The defendants obtained leave to serve, and on November 13, 1923, served on the shipowners a third party notice in accordance with Order XVI., r. 48, of the Rules of the Supreme Court. (1) The shipowners entered an appearance

(1) Rules of the Supreme Court, Order XVI., r. 48: "Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the

and then applied for leave to serve a similar notice upon the insurance company on the ground that they claimed to be entitled to indemnity from the insurance company and other underwriters on the policy of July 2, 1920, for the whole amount of the claim in the action. On December 18, 1923, the Master in chambers granted the application, and a notice, which was called a fourth party notice, was served on the insurance company. It complied in all material respects with Form I. in Appendix B to the Rules of the Supreme Court.

On January 17, 1924, an order was made by a Master in chambers that the owners should deliver a statement of claim to the insurance company who should plead thereto; that the insurance company should be at liberty to appear at the trial and be bound by the result thereof, and that the question of the liability of the insurance company to indemnify the owners should be tried at but after the trial of the action. On appeal Roche J. on February 20, 1924, set aside the order of January 17 and dismissed the insurance company from the action.

The owners appealed.

Clement Davies for the appellants. The appellants claim to be entitled to indemnity within the meaning of Order XVI., r. 48, first, by virtue of the policy of insurance, which is in its nature a contract of indemnity. Secondly, from the facts stated the proper inference is that the appellants or their managers, the defendants in the action, gave the orders for repairs as agents for and on behalf of the respondents; or that the respondents' surveyor, who was present throughout

---

Court or a judge, issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix B with such variations as circumstances may require" . . . .

C. A. 1924

CLOVER CLAYTON & Co. v. HESSLER & Co.

the work and authorized it and approved of the charges made for it, thereby contracted for and on behalf of the respondents that they would indemnify the appellants against claims by the plaintiffs.

Le Quesne for the respondents. The learned judge's order was right and should be affirmed. A policy of insurance does not entitle the assured to indemnity within the meaning of Order XVI., r. 48: *Johnston* v. *Salvage Association* (1); *Nelson* v. *Empress Assurance Corporation* (2); *British Dominions General Insurance Co.* v. *Duder.* (3)

The facts do not warrant the inference either that the appellants gave the orders for repairs as agents of the respondents, or that the respondents' surveyor undertook on their behalf that they would indemnify the appellants against claims by the plaintiffs. The surveyor did no more than was usual and convenient to both parties in being present and placing his experience at their disposal.

Clement Davies in reply cited *Carshore* v. *North Eastern Ry. Co.* (4)

BANKES L.J. Even upon the special facts of this case we ought not to interfere with the order which Roche J. in the exercise of his discretion has made as the best method of determining the dispute between these parties. The action was brought by a firm of ship repairers against certain persons who ordered repairs to be done to a ship. These persons were only acting as agents for the shipowners, and so the action may be treated as brought against the shipowners. The respondents are underwriters. It was sought to bring them in as fourth parties; but it is more convenient to deal with the case as if the shipowners were defendants and the underwriters were alleged to be third parties.

The shipowners seek to bring them in on three grounds. First it is said that the policy of insurance is a contract to indemnify the owners against the expense incurred in repairing a loss covered by the policy. Upon that point, apart from

(1) (1887) 19 Q. B. D. 458.
(2) [1905] 2 K. B. 281.
(3) [1915] 2 K. B. 394.
(4) (1885) 29 Ch. D. 344.

the special facts, it is impossible to invoke the third party procedure merely on the ground that a policy of insurance has been issued covering the loss which the shipowners have suffered, because that loss is not necessarily the equivalent of the ship repairer's claim.

Then it is said that from the special facts and the conduct of the underwriters' surveyor the true inference to be drawn is that the shipowners or their managers were giving the order for repairs as agents of the underwriters. That seems to me to be an extravagant inference to draw from the presence of the underwriters' surveyor watching the progress of the repairs and giving his opinion upon the best way of executing them.

The third contention brings the case nearer to third party procedure. It is the ordinary practice of underwriters, when a loss is said to have occurred, to send their surveyor to investigate; in the usual and reasonable course the surveyor in this case was taken into consultation, he was asked to approve of certain repairs and was asked whether the prices charged were reasonable, and he gave his assent on these points. From that we are urged to infer a contract by the surveyor on behalf of the underwriters that if the orders were given by the owners or their managers, the underwriters would not dispute either the quantity of work done or the prices charged; that is to say that the underwriters would indemnify the owners against a claim for the price of the repairs. This is a novel suggestion in a case of marine insurance, which if acceded to might extend the third party procedure to lengths not justified by the facts of this par ticular case. Therefore in my opinion Roche J. was right in declining to apply this procedure and in leaving the owners to issue their writ against the underwriters whereby the case will be tried as conveniently and as quickly. It has generally been regarded as a fixed rule that the third party procedure does not apply to a claim against underwriters. A departure from that rule because of special facts in this case might give rise to misconception in other cases and should not be allowed. The appeal should therefore be dismissed.

C. A. 1924

CLOVER CLAYTON & Co. v. HESSLER & Co.

SCRUTTON L.J. I agree. I think the order of Roche J. was right and in accordance with the usual practice. The third party procedure is limited to claims for indemnity or contribution, and there is, I believe, no reported case, and I never heard of a case, in which persons have been joined as third parties merely because they have underwritten a policy insuring the defendant against the loss which gives occasion for the plaintiff's claim. There are two reported cases which go to show that underwriters cannot be so joined. One is *Johnston* v. *Salvage Association* (1), where a shipowner incurred liability to salvors in an attempt to save his ship and was not allowed to join underwriters as third parties when sued by the salvors. The other is *Nelson* v. *Empress Assurance Corporation* (2), where it was held that an insurer who was sued on a policy of insurance could not join a reinsurer as a third party. In each case the ground of the decision was that the insurance was against loss which the assured may incur through loss of or damage to the subject matter of the insurance, and that was a different thing from indemnifying him against any claims by other people against him. Upon the same principle the original underwriter cannot be joined. I am not disposed to depart from the usual practice. We were asked to do this, first, on the ground that the policy of insurance itself entitled the owners to indemnity against the underwriters within the meaning of Order XVI., r. 48; then certain circumstances were relied on as special reasons, for example, that the underwriters' surveyor was present and approved of what the assured did—a fact which would appear in almost every case of marine insurance; or that other facts existed beyond what was usual which were said to single this case out from the general run of insurance cases. I have read the affidavit in support of the application. In my view it states no more than is always done for the convenience of both parties. The presence of the underwriters' surveyor is convenient to them in that it prevents the accident of repairs really necessitated by wear and tear being included in repairs due to damage insured against; and it is convenient to the

(1) 19 Q. B. D. 458. (2) [1905] 2 K. B. 281.

assured in so far as the underwriters are less likely to dispute an amount which their surveyor has approved of. I agree that the appeal should be dismissed.

C. A. 1924

CLOVER CLAYTON & Co. v. HESSLER & Co.

Appeal dismissed.

Solicitors for appellants: *Maude & Tunnicliffe.*
Solicitors for respondents: *Waltons & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A. 1924 *July* 23.

DIMENT *v.* ROBERTS.

Emergency Legislation—Landlord and Tenant—Standard Rent—Payments in Excess of permitted Increase—Claim for Recovery of Excess by Tenant—"Recoverable" within Six Months—Meaning of "recoverable"—Legal Action to be initiated within the Period—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 14, *sub-s.* 1 *—Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 8, *sub-s.* 2.

The effect of the provisions of s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, whereby any rent or interest paid by a tenant or mortgagor in excess of the increases allowed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, shall be "recoverable at any time within six months" is that the tenant, to recover the excess, must take some kind of legal proceeding, as by issue of a writ or summons, within the prescribed period. It is not necessary that he should actually have obtained judgment before the six months have expired.

Decision of the Divisional Court (Swift and Acton JJ.) affirmed.

Lewis v. *McKay; Algate* v. *Vugler; Clark* v. *Potter* [1924] 2 K. B. 136 approved and followed.

APPEAL from a decision of the Divisional Court (Swift and Acton JJ.), reversing the decision of the judge of the Brentford County Court.

By s. 14, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), a tenant who has paid

(1) The text is as follows:—"Where any sum has, whether before or after the passing of this Act, been paid on account of any rent or mortgage interest, being a sum which is by virtue of this Act, or any Act repealed by this Act, irrecoverable by the landlord or

C. A. 1924

DIMENT v. ROBERTS.

a sum of money to his landlord as part of his rent which is irrecoverable by the landlord because it is in excess of the standard rent, may recover it back or deduct it from the rent payable by him. By s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923: "Any sum paid by a tenant . . . . which, under sub-section 1 of section 14 of the principal Act" [the Act of 1920] "is recoverable by the tenant . . . . shall be recoverable at any time within six months from the date of payment, but not afterwards, or, in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act, but not afterwards." The Act came into operation on July 31, 1923.

The plaintiff alleged that he had made payments to the defendant, his landlord, in excess of the permitted increase, prior to the passing of the Act of 1923, and he brought an action in the Brentford County Court to recover them. Action was begun by summons issued on January 24, 1924, within six months of the passing of the Act, but when the case came on, on March 24, it was adjourned until March 28.

The county court judge upheld the objection taken by the defendant that the words of s. 8, sub-s. 2, of the Act of 1923, "recoverable at any time within six months," meant that within that period the tenant must actually have obtained a judgment for repayments of the excess. He therefore declined to hear the summons. Upon appeal, the Divisional Court held that the point raised was exactly within the decision in *Lewis* v. *McKay; Algate* v. *Vugler; Clark* v. *Potter* (1), where it was held that the obligation upon the tenant was to take some legal action, as by issue of writ or summons, within the

mortgagee, the sum so paid shall be recoverable from the landlord or mortgagee who received the payment or his legal personal representative by the tenant or mortgagor by whom it was paid, and any such sum, and any other sum which under the Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant may, without prejudice to any other method of recovery, be deducted by the tenant or mortgagor from any rent or interest payable by him to the landlord or mortgagee."

(1) [1924] 2 K. B. 136.

period. The Court therefore directed the case to be remitted to the county court for hearing.

The defendant appealed.

Paull for the appellant. "Recoverable" must mean that the tenant is in a legal position to recover his money, in which he can only be if he has obtained judgment. The Legislature must be taken to mean what it says, and it is only after judgment that the tenant can be said to have actually "recovered" the right to his money. *Morris* v. *Duncan* (1) and *Ings* v. *London and South Western Ry. Co.* (2) show that it is the accomplished fact, as shown by a judgment, and not the initiation of legal proceedings, which must be accomplished within the permitted period.

J. Duncan for the respondent was not called upon.

POLLOCK M.R. stated the facts, and having read s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, continued: Now what is the meaning of the word "recoverable"? Does it mean that the money must have been recovered, in the sense that a judgment must have been given to enforce its recovery, or does it mean that a suit for its recovery has been commenced? The Divisional Court decided that it means that the tenant must have taken steps to recover by issuing legal proceedings, and I think that view is correct. Counsel for the appellant referred to *Ings* v. *London and South Western Ry. Co.* (2), but it seems to me that that case has no bearing on the present one. One must always look at the purpose of an Act of Parliament, and the basis of each decision. There were other cases; *Morris* v. *Duncan* (1) was relied upon, but it seems to me that the judgment in that case was the exact opposite of the argument presented to us by counsel. I am satisfied that the judgment of the Divisional Court was right. It is impossible to suppose that the Legislature intended to leave the tenant to the chance of his right to recover falling within the area of a very busy court, or to be determined by the changes or chances of the court's business. I think the object of the Act was to maintain

(1) [1899] 1 Q. B. 4. (2) (1868) L. R. 4 C. P. 17.

C. A. 1924

DIMENT v. ROBERTS.

Pollock M.R.

the right of the tenant or mortgagor, but at the same time to impose some limit on the time for taking proceedings. I think the time during which the sum overpaid is recoverable is six months, and some legal steps must be taken by the tenant during that period to recover the money. I see no reason to say that what is a right given to a tenant or mortgagor is to be a right dependent upon the action of persons who are wholly independent of the tenant or mortgagor, such as judges, or persons whose duty it is to arrange the work of the courts. For the reasons given by Swift J. and for my own, I think the decision of the Divisional Court was right, and the appeal must be dismissed.

WARRINGTON L.J. read the relevant sections of the Acts of 1920 and 1923 and continued: What is the meaning of the word "recoverable"? I think it means that a person will have a right to recover the sum by means of legal proceedings, and I think it means that the sum will continue to be recoverable by means of legal proceedings within a certain period —namely, within six months. I cannot think that the Legislature would make the tenant's right to recover dependent upon the arrangements of a busy court. Sect. 42 of the Real Property Limitation Act, 1833, is of interest as an example of a statutory limit for the recovery of a sum by action; it reads: "No arrears of rent (*a*) or of interest in respect of any sum of money charged upon or payable out of any land or rent (*b*), or in respect of any legacy (*c*), or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due. . . . ." So far as I can see, it has never even been suggested that that means that judgment must have been obtained before the expiry of the period mentioned. I think therefore that the judgment appealed from is right, and the appeal must be dismissed.

ATKIN L.J. Some rather unfortunate expressions have been used in the last Rent Restriction Act, but I agree with

my brethren that the Divisional Court was right. It is said for the appellant that the word "recoverable" is used in a sense that parties are entitled to sue for these sums during six months, but that they can only recover them if a judgment has actually been obtained within that period. In the case of *Collins* v. *Hopwood* (1) Parke B. says (2): "The word 'recovered,' in the 85th section [of 1 & 2 Will. 4, c. lxxvi.], must therefore be read 'sued for.'" The case of *Morris* v. *Duncan* (3) is another authority where the word "recover" means to sue for, so "recoverable" would mean capable of being sued for. I think that on its true construction the section means that a tenant must assert his claim within six months, and that the words "recoverable at any time within six months" mean that the sums may be recovered if any proceedings have been brought within six months. Sect. 14 of the Act of 1920 gives one method of recovery, by deducting from the next rent payable; that would clearly continue for six months. Taking all facts into consideration, I think it is very improbable that the Legislature intended that the tenant should recover up to the last week by deducting from the rent, but not recover by taking proceedings unless judgment had actually been delivered. We all know that there are county courts where a court is not held except at considerable intervals. It seems to me that light has been thrown on the matter by the section of the Real Property Limitation Act, 1833, read by Warrington L.J., and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *E. A. R. Llewellyn.*
Solicitors for respondent: *Bono & Nimmo.*

(1) (1846) 15 M. & W. 459. (2) Ibid. 464.
(3) [1899] 1 Q. B. 4.

G. A. S.

C. A.

1924
June 27, 30;
July 15.

[IN THE COURT OF APPEAL.]

P. PHIPPS AND COMPANY (NORTHAMPTON AND TOWCESTER BREWERIES), LIMITED *v.* ROGERS.

[1924. P. 23.]

Landlord and Tenant—Licensed Premises—Tied House—Determination of Tenancy—Notice to quit—Ambiguity—"Months"—Lunar or Calendar.

A written agreement of tenancy of a public-house contained the clause: "Either party shall be at liberty to determine the tenancy hereby created upon giving to the other three months' previous notice in writing of his or their intention so to do expiring on any one of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate." On October 12, 1923, the landlords served on the tenant a notice to quit in these terms: "We hereby give you notice to quit and deliver up to us . . . . on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof All that," etc., naming the demised premises.

The justices of the district at the annual general meeting in February, 1923, had fixed January 8, 1924, as a date of special transfer sessions. At the annual general meeting in February, 1924, April 8, 1924, was fixed for special transfer sessions. If the words "three months" in the tenancy agreement meant lunar months, the earliest day on which the tenancy could be terminated by a valid notice to quit given on October 12, 1923, would be the earlier day fixed for the special transfer sessions—namely, January 8, 1924; but if the words "three months" meant three calendar months, April 8, 1924, would be the earliest day.

The landlords (notwithstanding that they had supplied the tenant with liquors after January 8 in the belief that he was entitled to three calendar months' notice to quit) brought an action for possession of the premises, alleging that the tenancy had been determined by a valid notice to quit expiring on January 8:—

Held (by Bankes, Scrutton and Atkin L.JJ.), (1.) that the expression "three months" in the tenancy agreement meant three lunar months, and (2.) that the landlords were not in the circumstances precluded from asserting that the tenancy had determined on January 8, if the notice to quit was valid; but

Held (by Bankes and Atkin L.JJ.; Scrutton L.J. dissenting), (3.) that the notice to quit was invalid, inasmuch as it placed upon the tenant the burden of resolving the questions of law (*a*) when his tenancy could be legally determined, and (*b*) what was a valid notice to quit.

Hirst v. *Horn* (1840) 6 M. & W. 393 considered.

May v. *Borup* [1915] 1 K. B. 830 disapproved.

Judgment of Lush J. [1924] 2 K. B. 45 affirmed on the third point; reversed on the first.

C. A.
1924
P. PHIPPS & Co. v. ROGERS.

APPEAL from the judgment of Lush J. (1)

The plaintiffs, who were brewers, by their writ dated February 8, 1924, claimed to recover from the defendant possession of the Abingdon Park Hotel, Northampton, in the following circumstances.

The premises were let to the defendant by an agreement dated May 29, 1908, on a tenancy from year to year from May 25, at a rent of 200*l.* a year payable quarterly. Either party could determine the tenancy "upon giving to the other three months' previous notice in writing of his or their intention so to do expiring on any one of the days appointed as special transfer sessions by the justices for the district in which the premises are situate after the expiration of six months from the date when the licence was or is transferred to the tenant." The defendant agreed to buy his supplies from the plaintiffs, and also undertook "to assign or transfer the residue of his licence to the landlords or their nominee and to attend when required so to do by the landlords before the justices to sign all necessary notices and to do all other acts and things which may be required at the end of the tenancy to transfer the said licence to the landlords or their nominee."

On October 12, 1923, the plaintiffs gave the defendant a notice to quit in the following form: "We do hereby give you notice to quit and deliver up to us (or such other person as we may appoint) on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof the possession of All that," etc., naming the demised premises.

The justices at their annual general meeting in February, 1923, had appointed January 8, 1924, as a date for holding special transfer sessions. At the annual general meeting on February 7, 1924, fresh dates were fixed. The first of these was April 8. If the expression "three months' notice" in the tenancy agreement meant three lunar months the notice to quit would expire on January 8, 1924; if calendar months were meant the notice would expire on April 8, 1924.

(1) [1924] 2 K. B. 45.

C. A. 1924

P. Phipps & Co. v. Rogers.

Ever since 1913 the plaintiffs had in their tenancy agreements defined " months " as calendar months. The defendant ordered his weekly supplies of beer for two weeks after January 8, 1924, and the plaintiffs, under the impression that all their tenants were entitled to three calendar months' notice to quit, and that the annual general meeting was a special transfer session, supplied him as if he were still their tenant. On January 21 the plaintiffs asked the defendant to sign transfers for February 7, but the defendant refused on the ground that he was under no obligation to do this. The plaintiffs' solicitors then saw the defendant's solicitors and said they would issue a writ when the notice to quit had expired. Early in February the defendant ordered supplies for seven weeks, and the plaintiffs replied that in supplying what was required they must not be taken to be recognizing the tenancy and that they were about to issue a writ for possession. Shortly afterwards they issued the writ in this action claiming that the " months " referred to in the tenancy agreement meant lunar months and that the notice to quit had expired on January 8.

The defendant contended that " months " in the tenancy agreement meant calendar months and that the notice to quit had not expired on January 8, and that whether it had or not it was vague and ambiguous and therefore an invalid notice.

Lush J. held that the notice to quit was invalid on account of its uncertainty and gave judgment for the defendant.

The plaintiffs appealed.

J. B. Matthews K.C. and *Geoffrey Howard* (*Sandlands* with them) for the appellants. The learned judge was wrong in holding that the notice to quit was void for uncertainty. The respondent had only to look at the tenancy agreement to find out what was " the earliest day " his tenancy could " legally be terminated by a valid notice to quit served " at a particular date. It was that day appointed as a special transfer session by the justices which should be three months after the service of the notice. " Month " in a legal instrument

means lunar month. "Month, unless the context or other admissible evidence shows the contrary, means lunar month in all documents except: (i.) ecclesiastical documents; (ii.) mercantile documents (*quaere* in the City of London only): per Farwell J., *Bruner* v. *Moore* (1); (iii.) Statutes since 1850: 13 & 14 Vict. c. 21, s. 4; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3; (iv.) Rules of the Supreme Court: Order LXIV., r. 1, and County Court Rules, 1903: Order LV.": Norton on Deeds. (2) "In a contract at law, month means a lunar month, unless there is admissible evidence of an intention in the parties using the word to denote a calendar month": Sugden, Vendor and Purchaser. (3) The general rule is recognized by this Court in *Schiller* v. *Petersen & Co.* (4) Three lunar months from October 12, 1923, would expire on January 4, 1924, and the respondent, the tenant of a licensed house, would know that the next special transfer session after January 4, 1924, would be on January 8, 1924. Therefore to him the notice was clear and unambiguous: *Hirst* v. *Horn* (5); *May* v. *Borup.* (6) "Certum est quod certum reddi potest." He cannot complain of being allowed four days longer than he was strictly entitled to.

The Hon. Sir M. Macnaghten K.C. and *Morle* for the respondent. A notice to quit must be clear and unambiguous not only to lawyers but to those laymen who are to act upon it. "Three months" after the service of the notice and before the date of the special transfer sessions, is an ambiguous expression. It may mean three lunar months, and it may mean three calendar months. The fact that of two possible meanings of an expression the law has chosen one does not make the expression plain and unambiguous. Besides the law does not always give the same meaning to the word "month"; a very slight indication is enough to show that the parties meant calendar month, and then the Court will give the word that meaning. Thus in mortgage transactions

(1) [1904] 1 Ch. 305.
(2) (1906) p. 155, citing Co. Litt. 135b; 2 Bl. Com. 141.
(3) 14th Ed. (1862), p. 257.
(4) [1924] 1 Ch. 394.
(5) 6 M. & W. 393.
(6) [1915] 1 K. B. 830.

C. A. 1924

P. Phipps & Co. v. Rogers.

"months" means calendar months: *Schiller* v. *Petersen & Co.* (1) The tenancy in the present case was from year to year, and if nothing had been said it would have been terminable by six calendar months' notice. When three months is substituted for six calendar months the natural inference is that the parties mean three calendar months. Moreover this is not merely an agreement of tenancy; it is an agreement to become tenant of a tied house, in other words an agreement for the purchase of goods. In a contract of sale of goods "month" means prima facie calendar month: Sale of Goods Act, 1893, s. 10, sub-s. 2.

It is said that by looking at the tenancy agreement the respondent could find out when the tenancy was determinable, but that document would not tell him what days had been fixed for transfer sessions. It is likely, but it cannot be assumed, that he knew the days appointed; if he did not, he would have to make inquiries. But surely it is for the landlord to inform the tenant of the day on which he is to quit, and not to impose on him the burden of finding out by means of inquiries.

By supplying the respondent with stores after January 8, 1924, the appellants have estopped themselves from insisting that the tenancy ended on that day.

Geoffrey Howard in reply.

Cur. adv. vult.

July 15. The following written judgments were delivered:—

Bankes L.J. This appeal raises the question of the validity of a notice to quit given by landlords to their tenant. The landlords are brewers and the tenancy was of licensed premises. The tenancy agreement was in writing and dated May 29, 1908, and it contained this clause: "Either party shall be at liberty to determine the tenancy hereby created upon giving to the other three months' previous notice in writing of his or their intention so to do expiring on any one

(1) [1924] 1 Ch. 394.

of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate after the expiration of six months from the date when the licence was or is transferred to the tenant." Notice to quit was given dated October 12, 1923, in the following terms: "We hereby give you notice to quit and deliver up to us (or such other person as we may appoint) on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof the possession of," then follows a description of the premises. The date of the service of the notice is indorsed on the back of the document as having been made on October 12. The premises are situate in the county borough of Northampton. At the date the agreement of tenancy was entered into the holding of special transfer sessions was authorized, and the dates on which they should be held was prescribed, by s. 4 of the Alehouse Act, 1828, which provided for the appointment by the justices at the annual licensing meeting assembled of not less than four nor more than eight special sessions to be held in the next ensuing year. The statute also contains provisions for the giving of public notice of the dates so fixed for the holding of the special sessions and requires that a copy of the notice shall be left at the dwelling-house of every person keeping an inn within the district. The Alehouse Act, 1828, was repealed by the Licensing Act, 1910, but as the material provisions of the former Act are practically repeated in the latter, no question arises out of the fact that the tenancy agreement was entered into when the Alehouse Act, 1828, was still in force. The general annual licensing meeting for the county borough of Northampton for the year 1923 was held on February 1, 1923, and one of the dates fixed at that meeting for the holding of special transfer sessions for the ensuing year was January 8, 1924. February 7, 1924, was the date fixed for the general annual licensing meeting of that year, and at that meeting, April 8, 1924, was the first date fixed for the holding of a special transfer session. At the time the notice to quit was given, and for some time afterwards, the appellants were under the belief that the

C. A. 1924

P. Phipps & Co. v. Rogers.

Bankes L.J.

notice did not expire until February 7, 1924, and they continued to supply beer to the respondent as their tied tenant after January 8, 1924. It is perhaps significant that the appellants themselves were so hazy as to the legal effect of their notice, but as that fact and the supply of beer under a misapprehension have, in my opinion, no legal effect upon the position of the parties, I say nothing further upon the point.

I do not feel any difficulty on the question whether the reference in the agreement to the necessity of a three months' notice is to be construed as lunar or calendar months. The rule requiring the expression to be construed as meaning lunar months is too clear and too well established, however worn out it may appear to be, to be got round or got over in a case such as the present except by some clear expression of the intention of the parties, derived either from the context or from surrounding circumstances, that they were referring to calendar and not lunar months. With deference to the view expressed by the learned judge who tried the action, I cannot agree with him in thinking that any such intention is manifested in the present case.

A much more difficult question to my mind is the question whether the notice to quit offends against the rule that a notice to be a good notice must be clear and unambiguous. It is not necessary that a notice should be clear and unambiguous in its expressed terms provided it can be rendered clear and unambiguous by the application of the maxim "Id certum est quod certum reddi potest." There are many decided cases in the books where the Courts have imputed to the tenant knowledge which, when applied to the notice to quit served upon him, renders clear what would without that knowledge have been neither clear nor unambiguous. In the case of a yearly tenant a notice to quit on a named date or on such other day as the tenancy shall expire next after the expiration of a year from the receipt of this notice, has been held to be good (1) upon the ground that the tenant must know, or be assumed to know, the date when the

(1) *Hirst* v. *Horn*, 6 M. & W. 393.

tenancy commenced. The case which has gone furthest in this direction appears to be *May* v. *Borup* (1), where the agreement provided that the tenancy might be determined by six months' notice on either side to be given on March 1, or September 1 in any year. On December 23, 1913, a notice was given to quit at the earliest possible moment. The Court held the notice to be a good one. This can only have been because the special terms of the tenancy agreement in the opinion of the Court enabled the tenant, by comparing the date of the notice with the terms of his agreement, to realize that August 31, 1914, was the earliest date on which he could be required to quit. This decision must, I think, be considered as a decision upon the particular facts of that case, and cannot possibly be regarded as an authority that a notice to quit at the earliest possible moment is under ordinary circumstances a good notice. Each case must depend upon its own facts and circumstances, and I do not think that the Court should attribute to either landlord or tenant a greater knowledge of fact or of law than has already in the decided cases been attributed to them, or extend the maxim I have referred to so as to embrace a wider class of cases than have already been brought within its influence. In the present case, had the notice been for the first date fixed for the holding of special transfer sessions next ensuing after the expiration of three lunar months from the date of this notice, I should be of opinion that the notice was a good notice having regard to the knowledge which must I think be imputed to the particular tenant of the dates fixed for the holding of these sessions. Had the notice omitted any reference to lunar months, I should have hesitated before holding that any of the decided cases went so far as to compel me to impute to the tenant such a knowledge of the law as would enable him to decide without doubt a question of construction upon which judges may differ, as they do in the present case. When, as here, the landlord is not content with placing the tenant under the necessity of solving one difficult question of law before he can know

(1) [1915] 1 K. B. 830.

C. A. 1924

P. Phipps & Co. v. Rogers.

Bankes L.J.

the date when he is required to give up possession, but puts him in the position of having to decide not only the earliest day when the tenancy can legally be determined, but also whether the notice to quit is a valid one, the time has come, in my opinion, when the Court must say that such a notice is certainly not clear and unambiguous in its expressed terms, and that it requires a degree of knowledge on the part of the tenant to make it clear and unambiguous which the Court will not impute to him. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

Scrutton L.J. The respondent was tenant of a public-house on the terms that his landlords could determine the tenancy by giving to the tenant "three months' notice," expiring on any one of the days appointed as special transfer sessions by the justices of the district. The lease was made in 1908 in what was then the landlords' ordinary form. Some years later the landlords altered their ordinary form for agreements made after that date to "three calendar months' notice." On October 12, 1923, the landlords gave the tenant a notice to quit "on the earliest day your tenancy can be legally determined by valid notice to quit." The next special transfer sessions were on January 8, 1924, and if "three months" meant three lunar months expiring on January 4, the notice to quit was in time for that date. I think there is no doubt however, if the evidence is admissible, that the landlords thought the months must be calendar months, and that the notice was good for February 7, the date of the annual licensing meeting, for which date the landlords served the tenant with forms of transfer of the licences. It is agreed however that the annual licensing meeting was not a special transfer session. The next special transfer session was April 8, but the writ for possession was issued on February 8, alleging a determination of the tenancy on January 8. By the agreement the tenant undertook to purchase from the landlords all beer to be brought on the premises to be consumed at prices usually charged by the landlords to their tenants. After January 8 the tenant ordered and the

landlords, who were under the impression that the tenancy continued till February 7, supplied beer presumably on these terms. What is the result of this? It is said for the landlords (1.) that months at common law mean lunar months, unless the case can be brought within certain exceptions, none of which apply here; (2.) that a valid notice to quit may be given "for the expiration of the tenancy" without specifying any date, even though the landlord does not know what the real date is; (3.) that conduct after the tenancy has expired at the utmost creates a new tenancy at will, which is determined by issuing the writ.

First, as to the meaning of "month." There is no doubt of the common law rule that prima facie month means lunar month. It is stated in Coke and Blackstone; a large number of authorities for it are referred to in Norton on Deeds. A recent instance of its application is found in the judgment of Farwell J. in *Bruner* v. *Moore*. (1) There are statutory exceptions, exceptions in the case of ecclesiastical documents, exceptions by custom mercantile, or otherwise, as in the case of notice to domestic servants. The relation of landlord and tenant has never been held to come within these exceptions. There may be an exception if the context or the surrounding circumstances at the time of making the contract show a contrary intention. I can find nothing in the context here to show any intention of the parties; this is not a contract for a year, but is determinable on any special sessions day. I do not see how conduct after the contract has been made can show a meaning in the original contract. The parties may have misunderstood the meaning, which may give rise to an estoppel but cannot alter the true construction of the contract. Parliament may alter any common law rule it likes; there are several it might usefully alter; but I do not see how the Court of Appeal can alter a common law rule because it thinks from its general knowledge that the meaning of "month" is changing. I think therefore the term "months" in this agreement meant lunar months.

(1) [1904] 1 Ch. 305.

C. A. 1924

P. PHIPPS & CO. v. ROGERS.

Scrutton L.J.

The next question is whether the notice to quit is sufficient. The Courts might well have said that the notice must name a day to quit and the right day, but they have not. They have, in my view, treated landlord and tenant as both knowing the law, and have assumed that the tenant must know the necessary facts. They have allowed the landlord to give a notice for a named day, or for the later day unnamed on which the tenancy actually expired. Parke B. and Lord Abinger justify this in *Hirst* v. *Horn* (1) in the case of yearly tenants where the landlord is not sure on what day the year ends. But the cases go beyond this. In *Doe* v. *Timothy* (2) Holroyd J. held a notice to quit "at the expiration of the present year's tenancy," without stating the length of notice, was good in the absence of proof that less than the right notice was given. This appears to be substantially the same as the judgment of A. T. Lawrence J. in *May* v. *Borup* (3) upholding a notice to "quit at the earliest possible moment," which however does not expressly mention the terms of the agreement, but assumes the parties know them. The present agreement mentions specific days on which the tenancy can be determined, days which are public days, which all citizens concerned with public-houses may be assumed to know, and of which under the Licensing Acts the tenant would have notice served on him, and the notice to quit determines the tenancy on the first of those days on which it can legally be determined. Whatever I might think if there were no authorities, I do not feel able to depart from a long settled line of authorities on the faith of which many transactions have been concluded.

Lastly, does the conduct of the landlords alter the matter? I do not see how the fact that at some period during the tenancy they thought or said the tenancy terminated on another day is relevant. This was so in a number of the yearly tenancy cases, but did not there avail the tenant. The ordering of beer and acceptance of the order are after the date when the tenancy in fact determined. It seems to me

(1) 6 M. & W. 393, 395. (2) (1847) 2 Car. & K. 351.
(3) [1915] 1 K. B. 830.

this has only the effect, as there has been no receipt of rent, of creating a tenancy at will determinable by the issue of the writ.

In my view I am bound by old-established principles, which I have no power to refuse to apply except in circumstances which do not exist here, to hold that the landlord has a good claim for possession. Even if in the absence of authority I might have come to a different decision, I do not particularly regret the result in the case of this tenant, who, as is the way with the modern tenant, has expressed his intention not to go out until he is ejected.

In my view the appeal should be allowed, and judgment entered for the landlord for possession, with costs here and below.

Atkin L.J. This is an action by the plaintiffs, a brewery company, to recover possession of licensed premises from the defendant, who by an agreement of tenancy dated May 29, 1908, became tenant to the plaintiffs of the Abingdon Park Hotel, Northampton. It was a term of the tenancy that either party might determine the tenancy by "three months' previous notice in writing of his intention so to do expiring on any one of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate after the expiration of six months from the date when the licence was or is transferred to the tenant." The writ was issued on February 8, 1924. The plaintiff alleges and the defendant denies that the tenancy had been determined by a notice to quit expiring before that date. The material dates are October 12, 1923, notice to quit given—the form must be examined hereafter; January 4, 1924, three lunar months from notice to quit expire; January 8, first special transfer sessions held after January 4; January 12, three calendar months from notice expire; February 7, annual licensing meeting; February 8, writ. It is beyond dispute that the plaintiffs intended to give three calendar months' notice. They thought that the defendant held under their form of agreement, which since

C. A. 1924

P. Phipps & Co. v. Rogers.

Atkin L.J.

1913 has stipulated for three calendar months' notice. They also thought that the annual licensing meeting was a special transfer session. The result was that after January 8 they continued to supply the defendant with liquor as a tied tenant; and on January 21 required him to give a fortnight's notice of transfer for the annual licensing meeting, and on his refusal intimated that on the expiration of his notice to quit they would issue a writ. In spite of these two mistakes they now say that the notice was good as a three lunar months' notice, that January 8 was the first special transfer session after that date, and that the tenancy terminated on January 8. The notice to quit is in the terms which have been read. Three objections amongst others are taken by the tenant: First, that the notice to quit must be a three calendar months' notice, and that no special transfer sessions had been held before the writ to which the notice could be applicable; secondly, that the notice to quit is bad as being uncertain and ambiguous; thirdly, that the notice to quit was waived by reason of the plaintiffs subsequently treating the defendant as tenant.

On the first point I think that the landlords are right. According to the rule of the common law a month means lunar month, unless the contrary is indicated by the context, by statutory provision or by recognized exceptions. What the origin of the common law rule is I have not been able to discover. Lord Coke merely states the rule. Blackstone says: "Not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks." He proceeds to say: "Therefore, a lease for 'twelve months' is only for 48 weeks; but if it be for 'a twelvemonth' in the singular number, it is good for the whole year." (1) The reason appears inadequate. The result is to adopt a meaning which is nearly always contrary to the intention of the parties. The rule is fortunately almost destroyed by exceptions. It does not apply to mercantile documents, or to statutes, or to mortgages, or to cases where the context requires the meaning of calendar months. It

(1) 2 Bl. Com. 141.

never did apply in ecclesiastical law. In the residue of cases, however, it clearly does apply, as is established by a series of authorities which we cannot overrule. I am clearly of opinion that it is a public disadvantage that the rule should continue; and it is worth the consideration of the Legislature whether the prima facie construction of calendar month enacted by the Interpretation Act should not be applied to all transactions. In the meantime the rule prevails. I am unable to find anything in the context which is in any way inconsistent with the common law use, or tends to show that calendar months was intended. I think therefore that the tenancy agreement must be construed as though three months meant three lunar months.

This still leaves the question whether the notice as given is a valid notice. A notice to quit may be the subject of express agreement; it may be required by law in the absence of agreement, as in the case of a weekly, monthly or yearly tenancy. However the necessity arises I think that the principle expressed by Lord Coleridge C.J. in *Gardner* v. *Ingram* (1) is correct: "Although no particular form need be followed, there must be plain unambiguous words claiming to determine the existing tenancy at a certain time." Bowen J. in the same case uses language to the same effect. The date of determination must be the right date. It may however be given alternatively, and it is sufficient if one of the alternatives, without expressing the actual date, denotes it in terms which enable the person receiving it to make it certain. Thus notice for a fixed day "or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the date of this notice" is sufficient. (2) It is to be noted that in such a case the legal or agreed period of notice is mentioned; and the date of the expiration of the tenancy is a question of fact which the tenant knows, or can properly be deemed to know. And it is possible that if the notice is given sufficiently long before the expiration of the tenancy for the full period of the

(1) (1889) 61 L. T. 729, 730.

(2) *Hirst* v. *Horn*, 6 M. & W. 393.

C. A. 1924

P. Phipps & Co. v. Rogers.

Atkin L.J.

required notice to expire, the actual period need not be mentioned. But it appears to me to defeat the whole object of notice, to leave the date to be ascertained by the tenant as a problem not of fact but of law. In the present form of notice the legal requisites are invoked twice over, "the earliest day your tenancy can legally be determined by valid notice to quit given at the date of service hereof." A tenant receiving such a notice might have to consult his solicitor, who might have to consult counsel, who might have to advise an application to the Court for a declaration by action or summons. What would be the effect of such a notice given to or by a tenant where there was a question whether the holding was an agricultural holding or not? Surely the risk, if there is a risk, of fixing the true legal term should fall on the person giving the notice. Again, what would be the effect of such a notice upon the ordinary class of weekly tenant? It has quite recently been the subject of discussion in the Courts with some difference of judicial opinion whether on such a tenancy the notice must be a week's notice or a reasonable notice; and in any case whether it must terminate at the end of a current week of the tenancy. In the present case the tenant is left to determine for himself whether three months means lunar or calendar months, and a lawyer of Lush J.'s great reputation might have advised him calendar months. He might then have to determine whether the annual licensing meeting could or could not be a special transfer session and then he would have to find out when the special transfer sessions in fact are going to be held. That the law should impute to every person knowledge of its provisions is one thing, but that a notice between landlord and tenant, which presumes such knowledge, is certain and unambiguous seems to me to be quite a different proposition. The value of the presumption so far as it bears on certainty is illustrated by the fact that the landlords themselves took an erroneous view of the meaning of special transfer sessions. It appears to me that this notice fails in the first essential of a notice—certainty—and is invalid. I think that the above reasoning leads to the conclusion that the case of *May* v.

Borup (1) was wrongly decided, and I so hold. The notice in that case was to leave "at the earliest possible moment." If this form is correct I cannot see why any one adopts any other. It is simplicity itself. It is also, in my view, so uncertain as to be invalid. Short, simple and wrong.

It becomes unnecessary to consider the third point of waiver. I may say however that waiver of notice to quit is constituted by conduct indicating that the landlord treats the former tenant as still his tenant, notwithstanding the determination of the term by a valid notice to quit; in other words it is evidence of a new tenancy, after the old would have expired. I cannot see how this inference can be drawn from conduct of the landlord which does not assume that the old tenancy has expired, but assumes that it is still continuing and that the period of the notice has not yet come to an end. In such a case the tenant, as it appears to me, would have to rely upon an estoppel, and I am not clear that the elements of estoppel in this case exist. It is however unnecessary to decide this.

I think that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Becke, Green & Stops, Nottingham.*

Solicitors for respondent: *James, Mellor & Coleman, for Phipps & Troup, Northampton.*

(1) [1915] 1 K. B. 830.

W. H. G.

C. A.
1924
July 24, 25.

[IN THE COURT OF APPEAL.]

WILCOCK *v.* PINTO AND COMPANY.

Revenue—Income Tax—Non-resident Person—Assessment in Name of Agent—Authorized Person—Trade within United Kingdom—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sch. D—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 31.

An Egyptian firm habitually sold cotton in England through one agent in Manchester. Sometimes the firm cabled to the agent that they had a specified quantity of cotton for sale at a price not below a specified limit and upon terms fixed by them in each case; sometimes the agent obtained from intending purchasers offers to buy cotton, which offers he transmitted to the firm for their approval or rejection. In the first case the agent sold the cotton according to the firm's instructions. In the second case, if the firm approved the offers they informed the agent and he accepted the offers and made the necessary contracts in each case. The firm then shipped the goods and drew on the purchaser a bill payable in London for an amount including the cost of the goods and freight and insurance from Alexandria. They discounted the bill with bankers in Alexandria who sent the bill with the bill of lading to the purchaser. The goods were released when the purchaser had discharged or made himself responsible for the bill, but not before; and they were released to him direct and not through the agent. The agent was not responsible to the firm for bad debts. He was at liberty to do, but did not in fact do any business other than that of the firm. The firm sold some of their cotton in Liverpool through a broker:—

Held, that the firm was exercising a trade in England, the contracts for the sale of the cotton having been made in England and the price of the goods being payable in England; and probably delivery of the goods taking place there, though it was not necessary to decide this.

Held, also, that the firm was exercising the trade through an agent being an authorized person carrying on its regular agency within the meaning of s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915, and was therefore chargeable in the name of the agent to income tax in respect of profits and gains arising through the agency.

Erichsen v. *Last* (1881) 8 Q. B. D. 414 and *Grainger & Son* v. *Gough* [1896] A. C. 325 followed. *Crookston* v. *Furtado* 1911 S. C. 217 not followed.

Decision of Rowlatt J. [1924] 1 K. B. 304 reversed.

APPEAL from the decision of Rowlatt J. (1) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on April 4, 1922, Mr. F. Kummer appealed against an assessment to income

(1) [1924] 1 K. B. 304.

tax made on Messrs. Pinto & Co. in the name of F. Kummer under Sch. D of the Income Tax Act, 1853, s. 41 of the Income Tax Act, 1842, and s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915 (1), for the year which ended on April 5, 1918.

1. The said F. Kummer had since 1915 acted for the firm of Pinto & Co.

2. Pinto & Co. were cotton merchants in Alexandria in Egypt. They sold cotton to, or in, every part of the world. In September, 1915, they arranged with Kummer that he should be their agent for the sale of their cotton in Manchester and be remunerated with a commission of 1 per cent. on the sales, out of which he should meet his own expenses. The agreement between Pinto & Co. and Kummer under which he began to act for them had been lost, but the following letter dated September 19, 1919, by which the agency was continued, was appended as part of the case: Pinto & Co. to "Messrs. Kummer & Leigh, Manchester. Dear Sirs, Mr. Fred. Kummer, our Manchester agent, is writing (sic) to us on the 4th instant stating that he has taken into partnership Mr. Egerton T. Leigh and that the firm will be known as above addressed. . . . . We

(1) Finance Act (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 31: (1.) "Sect. 41 of the Income Tax Act, 1842 (which relates to the charge of income tax in special cases), shall, so far as it relates to the taxation of non-residents, be extended:—

(*a*) So as to make non-resident persons chargeable to income tax in the name of any branch or manager as well as in the name of any factor, agent, or receiver; and

(*b*) so as to make non-resident persons so chargeable, although the branch, factor, agent, receiver, or manager may not have the receipt of the profits or gains of the non-resident.

(2.) "A non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under s. 41 of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver, or manager."

(6.) "Nothing in s. 41 of the Income Tax Act, 1842 (as amended by any subsequent enactment or by this section), shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person carrying on the non-resident's regular agency or a person chargeable as if he were an agent in pursuance of this section, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent."

C. A. 1924

WILCOCK v. PINTO & Co.

hereby beg to confirm you [in] the agency of our firm for the sale of Egyptian cotton in your market on the same conditions as those agreed with Mr. Fred. Kummer, i.e., 1 per cent. commission on all sales and orders booked through your good selves. Cable expenses to our charge. Commission account, &c., to be remitted quarterly. Quality to be equal to sample and in case of dispute to be settled amicably if possible or eventually by a Liverpool arbitration. Cotton to be insured with a good English company up to the mill. Gross weight guaranteed equal to gross landing re-weights." . . . .

Pinto & Co. sold some of their cotton in Liverpool through a broker.

3. The business conducted by Kummer as agent for Pinto & Co. took two forms. He either—

(A) sold cotton for Pinto & Co. at prices within the limit fixed by them: these sales were only of quantities specified by Pinto & Co. by cable; the selling price and terms of the sale were separately fixed by Pinto & Co. when they cabled permission to offer any quantity; or

(B) obtained offers to purchase cotton, the terms of which offers were transmitted by him to Pinto & Co. for acceptance or rejection. On receipt of instructions from Pinto & Co. the acceptance or rejection of the offer was carried out by Kummer either making the necessary contract, as hereinafter appears, or refusing the offer as the case might be.

The following series of copies of documents illustrates the second of these two forms of business. Similar documents, mutatis mutandis, would be used for the first form, but the first three of the following series of documents would not be necessary.

(i.) Letter from Kummer to A. B. acknowledging the receipt of an offer to buy cotton: "October 12, 1917. I am obliged by your order for 25 bales Sakell equal type EZ1 at 27½*d.* c.i.f. prompt shipment to Manchester or Liverpool former preferred with reimbursement on —— Bank, Ld., Bolton,

payable London three months after date, and have cabled same to my Alexandria friends for prompt reply. It may be Monday or Tuesday till I hear, cables are often delayed." . . . .

(ii.) Cable from Kummer to Pinto & Co. "October 12, 1917. A. B. Empuerco. We make you a firm bid for 25 bales EZ1 at 27½*d.* c.i.f. prompt. Boabab. Draw as before."

(iii.) Cable from Pinto & Co. to Kummer. "25 b.c. 50. Accept A. B. empuerco 27½. Pinto."

(iv.) Letter from Kummer to A. B. accepting offer and enclosing contract. "October 15, 1917. To Messrs. A. B. . . . . I have pleasure in confirming sale to you [on] account [of] Messrs. Pinto & Co. of 25 bales Sakell type EZ1 at 27½*d.* c.i.f. prompt shipment, and herewith hand you contract. Please return the counterpart duly signed." . . . .

"October 15, 1917. I have this day sold to you on behalf and for account of Messrs. Pinto & Co., Alexandria, 25 (twenty-five) bales Egyptian cotton, quality EZ1 type, prompt shipment per steamer $\frac{\text{and}}{\text{or}}$ steamers from Alexandria to Manchester, former preferred, at 27½d. (twenty-seven pence halfpenny) per pound, cost, freight and insurance, to be invoiced at Alexandria gross weight less usual allowance for tare. War risk excluded but to be covered by shippers and charged to your account. Marine insurance to be provided by shippers for 10 per cent. in excess of invoice cost, covering risk to mill or warehouse. Reimbursement by shippers' draft on Williams Deacon's Bank, Ld., Bolton, payable in London at three months from date of bill, and you agree to protect the said draft on presentation." . . . .

(v.) Letter from A. B. to Kummer, being the counterpart detached from the contract: "October 15. To Mr. Fred. Kummer.

"We herewith confirm purchase through you from Messrs. Pinto & Co., Alexandria, of twenty-five bales Egyptian cotton quality EZ1 at 27½*d.* per lb. c.i.f. prompt shipment to Manchester or Liverpool, former preferred."

[A printed form was used for the contract mentioned in (iv.) and the counterpart mentioned in (v.)]

(vi.) Telegram from Pinto & Co. to Kummer notifying

C. A. 1924

WILCOCK v. PINTO & Co.

shipment: "Shipping steamer *Bavarian* 25 EZ1 A. B. insuring 2400*l*."

(vii.) Letter from Kummer informing A. B. "Messrs. Pinto advise shipping per SS. *Bavarian* 25 bales EZ1 for your account. The insurance will be covered for 2400*l*."

(viii.) Letter from Pinto & Co. to Kummer. "Alexandria, October 18, 1917—A. B.—We accepted your offer of the 12th inst. of 25 bales EZ1 at 27½*d*. c.i.f. reimbursement as before. Enclosed sale note No. ."

The enclosure. "Sale note No. . Mr. Fred. Kummer, Manchester. Alexandria, October 13, 1917. We confirm having sold to-day through your good selves to A. B., Bolton, twenty-five bales of Egyptian cotton equal to our type EZ1 at 27½*d*. per net lb. c.i.f. Manchester. War risk excluded. Shipment prompt. Reimbursement at three months after date on London."

(ix.) Letter from Pinto & Co. to A. B. forwarding invoice and weight note. "Alexandria, November 5, 1917. Messrs. A. B. In execution of the order you have sent us through our agent Mr. Fred. Kummer, Manchester, we beg to hand you enclosed invoice and weight note for . . . . EZ1 25 bales of cotton, contract No. 14, shipped to-day for Liverpool for your account. We have covered marine insurance with Messrs. Kleinwort, Sons & Co., London, and war risk for your account with H. B. Majesty's Government. Against this shipment and following the instructions received from our agent we have to-day drawn for your account on the Bank, Ld., Bolton, payable in London the following draft at three months after date: No. 1724 2127*l*. 8*s*. 8*d*. o/ National Bank of Egypt, and you will please do what is necessary for the protection of it."

(x.) Extract from account of commission forwarded by Pinto & Co. to Kummer. "Alexandria, November 6, 1917. Please take note that we have passed to your credit 1% commission on the following invoice: A. B. . . . . EZ1 . . . . 25 bales, ss. *Bavarian*, 2127*l*. 8*s*. 8*d*."

4. Under the arrangement so made the goods were shipped c.i.f. in Alexandria and Pinto & Co. received payment by

means of bills which they drew in Alexandria on the purchasers and discounted with a bank there. The bills so drawn and discounted, together with a copy of the bill of lading, were forwarded by the discounting bank to the United Kingdom, and the goods were only released to the purchasers upon their discharging or making themselves responsible for the discounted bills. Kummer took no part in this stage of the transaction.

5. Ordinarily Kummer was not in any way concerned in the way in which payment was made for the goods. He had however occasionally collected additional charges. He was not responsible for bad debts. He was at liberty to do other business which did not compete with that of Pinto & Co., but in fact the only business he did was that in relation to Pinto & Co. as described above. The name of Pinto & Co. was not displayed at his office, though it was used on his letter paper and on the forms of contract. No stock of cotton was kept by him on behalf of Pinto & Co. and there is no special goodwill attaching to Pinto & Co.'s cotton as distinguished from any other Egyptian cotton of similar quality. He had samples of Pinto & Co.'s cotton to show and had visited mills with them to get orders. In the autumn of 1919 and in 1920, in exceptional circumstances, he sold small quantities of cotton which had been consigned to himself by Pinto & Co., but in all other cases the sales were made in the manner above described and the cotton was consigned direct to the purchasers. He referred to Pinto & Co. all disputes relating to weight and paid claims according to their instructions.

In these circumstances Kummer contended that Pinto & Co. did not exercise a trade within the United Kingdom. The Commissioners upheld this contention and discharged the assessment. On appeal Rowlatt J. confirmed the decision of the Commissioners.

The Crown appealed.

Sir Patrick Hastings A.-G. and *R. P. Hills* for the Crown. The question whether a non-resident firm exercises a trade in

C. A. 1924

WILCOCK v. PINTO & CO.

this country is a question of fact. "There are a multitude of things which together make up the carrying on of trade": per Jessel M.R. in *Erichsen* v. *Last*. (1) The first and most important matter is where the profitable contracts are habitually made: per Brett L.J. in the same case (2), cited with approval by Lord Herschell in *Grainger & Son* v. *Gough* (3) in the House of Lords; *Werle & Co.* v. *Colquhoun* (4); and the decisions of the learned judge himself in *Smidth & Co.* v. *Greenwood* (5) (which was affirmed in the Court of Appeal (6) and again in *Greenwood* v. *Smidth & Co.* (7) in the House of Lords) and *Maclaine* v. *Eccott* (8) are to the same effect. Next in order of importance comes the question, where the contracts are habitually performed; that is (*a*) where the goods are delivered, and (*b*) where payment is made: *Maclaine* v. *Eccott*. (8) Clearly the contracts in Class A of the respondents' business are made in this country. The offers are made by Kummer in this country and accepted by the purchasers in this country, the respondents having previously informed Kummer of the quantity, the quality and the price of the goods to be disposed of. The contracts in Class B are also made here. The intending purchasers make offers to Kummer in this country; he transmits them to the respondents for approval or rejection; they inform Kummer of their approval, and Kummer here accepts the offers.

Secondly, the goods are delivered here. Para. 4 of the case states that the goods were only released to the purchasers when they paid, or made themselves responsible for, the bills of exchange drawn upon them by the respondents and payable in London.

Thirdly, payment is made here, the bills are payable in London. It is true that for their own convenience the respondents in consideration of a present payment assign to their bankers the right to future payment in London, but

(1) 8 Q. B. D. 414, 416.
(2) 8 Q. B. D. 418.
(3) [1896] A. C. 325, 335.
(4) (1888) 20 Q. B. D. 753.
(5) [1920] 3 K. B. 275.
(6) [1921] 3 K. B. 583.
(7) [1922] 1 A. C. 417.
(8) (1924) Tax Leaflet No. 120.

that does not alter the fact that the payment for the goods is to be made in London. Therefore the contracts which constitute the respondents' trade are both made and performed in this country; and it follows that the trade is exercised in this country.

Furthermore it is clear from the facts stated that Kummer was an authorized person carrying on the respondents' regular agency. The learned judge has held that Kummer was a broker, and seems to be of opinion that the case is thereby concluded in favour of the respondents. But Kummer does business for no one besides the respondents and has for seven years done their business with their authority. The fact that the business consists of making contracts for them, which is the business of a broker, does not prevent him from being an authorized person carrying on their regular agency. If he is doing so the respondents were properly assessed in his name by virtue of s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915.

Latter K.C. and *Bowe* for the respondent. This case cannot be distinguished from *Crookston Bros.* v. *Furtado* (1), where the judgment of the Court of Session was in favour of the taxpayer and against the Crown. That decision has stood unchallenged for fourteen years. The place where the contracts constituting the trade are made is not decisive of the question where the trade is carried on: see per Atkin L.J. in *Smidth & Co.* v. *Greenwood.* (2) The test is when and where do the profits arise in respect of which the foreign firm is being taxed. They arise in this case when Pinto & Co. elects to refuse or accept the purchaser's offer to buy, where the particular transaction is one of class B, or where Pinto & Co. through their mouthpiece Kummer offer their cotton for sale on their own terms where the sale is one of class A. The distinction is where the foreign merchant carries on a trade with England and where he carries it on in England. The same distinction is material in deciding whether service of a writ may be made here on the agents of a foreign firm, under Order XLVIII. (A) of the Rules of the Supreme Court, and one

(1) 1911 S. C. 217.

(2) [1921] 3 K. B. 583, 593.

C. A. 1924

WILCOCK v. PINTO & Co.

matter to be considered then is whether the foreign principal reserves to himself the right of deciding whether offers made to his agent in this country shall be accepted or not: *Okura & Co.* v. *Forsbacka Jernverks Aktiebolag.* (1)

BANKES L.J. This is an appeal from the judgment of Rowlatt J. upon a case stated by Special Commissioners raising the question whether this foreign firm is chargeable with income tax in respect of profits made in this country.

The respondents are an Egyptian firm carrying on business at Alexandria. They do business in this country in the sense that some of their cotton is sold in this country through the instrumentality of one Kummer, who carries on business in Manchester. The question is whether the respondents are carrying on business in Great Britain. If they are, then formerly by s. 41 of the Income Tax Act, 1842, and now by Sch. D (*a*) (iii.) and general rule 5 to the Schedules to the Income Tax Act, 1918, being persons not resident in Great Britain, they are chargeable in the name of any agent having the receipt of any profits or gains arising as in the Acts mentioned. There are three or four decisions to which I should like to refer; first to a dictum of Brett L.J. in *Erichsen* v. *Last* (2), which was cited with approval by Lord Herschell in *Grainger & Son* v. *Gough.* (3) Brett L.J. said: "I think it would in the first place be nearly impossible, and secondly wholly unwise, to attempt to give an exhaustive definition of what is a trade exercised in this country. The only thing that we have to decide is whether, upon the facts of this case, this company carry on a profit earning trade in this country. I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil

(1) [1914] 1 K. B. 715. (2) 8 Q. B. D. 414, 418.
(3) [1896] A. C. 325, 335.

the contracts is done abroad." In *Grainger & Son* v. *Gough* (1) Lord Herschell said: "In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the principal test whether trade was being carried on in this country"; and then he quoted the passage I have just read from *Erichsen* v. *Last*. (2) In *Grainger & Son* v. *Gough* (3) it was held that the foreign merchant, M. Louis Roederer, was not carrying on a trade in this country. To show the distinction between that case and this, I point to Lord Herschell's statement concerning M. Roederer's business and the connection of Messrs. Grainger & Son, the appellants, therewith. He said (3): "All that the appellants have done in this country on behalf of M. Roederer has been to canvass for orders, to transmit to him those orders, when obtained, and in some cases to receive payment on his behalf. Beyond this he has done nothing in this country, either personally or by agents." The firm in this country who were acting as agents received orders which they transmitted to France. The merchant in France either accepted or rejected the orders himself. If he accepted them he consigned the goods to the purchaser deliverable in France. In these circumstances it was held that the foreign merchant was not carrying on a trade in this country.

Then the question came before Rowlatt J. himself in *Smidth & Co.* v. *Greenwood*. (4) After going through a number of authorities he expressed himself thus (5): "I cannot read the judgments in those cases without being driven to the conclusion, notwithstanding some remarks of the Master of the Rolls in *Erichsen* v. *Last* (6), that the real place where the trade is exercised is the place where the transactions forming the alleged business are closed, in the case of a selling business, by the sale of the commodity and the profit thereby realized. It seems to me that is a clear and definite principle. Until the sale is effected the trade is incomplete." That case went

(1) [1896] A. C. 325, 335.
(2) 8 Q. B. D. 418.
(3) [1896] A. C. 325, 335.
(4) [1920] 3 K. B. 275.
(5) [1920] 3 K. B. 286.
(6) 8 Q. B. D. 414.

C. A. 1924

WILCOCK v. PINTO & Co.

Bankes L.J.

to the Court of Appeal (1) and to the House of Lords (2), and was affirmed on both appeals. Again in *Maclaine* v. *Eccott* (3) the same learned judge after dealing with the familiar group of cases said: "I think the result of the cases is that the place of the making of the contract is the most vital element, and further that there may be trades in which the making of the contracts in this country is alone enough to establish the exercise of the trade here. I think Brett and Cotton L.JJ. were of this opinion in *Erichsen* v. *Last*. (4) Most of the cases have dealt with foreign manufacturers seeking in this country a market for their wares, and the question has been really (as Fry L.J. pointed out in *Werle & Co.* v. *Colquhoun* (5)) whether they have, in addition to manufacturing, set up a merchant's trade here. In such cases the place of delivery and the mode of payment have often been given a certain prominence." The learned judge there treats the making of the contract as a vital element to which the considerations of the place of delivery and mode of payment may add a certain weight. He then goes on to apply the law to the facts of the case, and says (6): "The case before me, however, deals with a trade in produce, the subject of world-wide commerce. Markets exist here in which shipments of these commodities can be sold and resold, consigned c.i.f. to this country or elsewhere, or f.o.b. in the country of origin. The Java firm are shippers, and through the London firm enter these markets to sell. I do not think it possible that they exercise a trade here in respect of the goods that come here and not in respect of those that go elsewhere. Nor do I think it can make any difference where or by what device they arrange to receive payment. It is all arranged here. I think the making of the contracts in such a market is the trade." In my view that is a correct statement of the law.

Before I come to the facts I wish to refer to another line of authority upon the question when service of a writ can be

(1) [1921] 3 K. B. 583.
(2) *Greenwood* v. *Smidth* [1922] 1 A. C. 417.
(3) (1924) Tax Leaflet No. 120, p. 5.
(4) 8 Q. B. D. 414.
(5) 20 Q. B. D. 753.
(6) (1924) Tax Leaflet No. 120, p. 6.

made upon a foreign firm. This can be done when the foreign firm is carrying on business here. But it does not follow that what is a test in the one class of cases is also a test in the other. I agree that in the passage which has been read from *Okura & Co.* v. *Forsbacka Jernverks Aktiebolag* (1) Buckley L.J. seems to think it a very material consideration, in deciding whether a writ can be served upon the agents of a foreign firm, that the foreign principal reserves to himself the right to determine whether the agents in this country shall or shall not make a contract in this country. But in a question arising upon the Income Tax Acts the Court should be guided by the cases which have interpreted the expression "exercise a trade" in this country as used in those Acts rather than by cases upon the service of writs under Order XLVIII. (A).

I come now to the facts of this case: Mr. Kummer of Manchester was the agent of Pinto & Co. We do not know the exact terms of the agency. There is a letter of September 19, 1919, which the respondents wrote to Mr. Kummer when he took in a partner. They wrote: "We beg hereby to confirm you [in] the agency of our firm for the sale of Egyptian cotton in your market on the same conditions as those agreed with Mr. Fred. Kummer." Then they state the conditions. The case states that: "(1.) The appellant"—i.e., Mr. Kummer—"has since the autumn of the year 1919 been in partnership with Mr. Leigh. Before Mr. Leigh joined him in his business, he carried on business on his own account, which business has since 1915 consisted in acting for Pinto & Co. under the circumstances hereinafter set out. (2.) Pinto & Co. are cotton merchants in Alexandria in Egypt, and sell cotton to, or in, every part of the world. In September, 1915, they arranged with the appellant that he should be their agent for the sale of their cotton in Manchester and be remunerated with a commission of 1 per cent. on the sales, out of which he should meet his own expenses. Pinto & Co. sell some of their cotton in Liverpool through a broker." Para. 5 of the case states that Mr. Kummer

(1) [1914] 1 K. B. 715.

C. A. 1924

WILCOCK v. PINTO & Co.

Bankes L.J.

"is at liberty to do other business which does not compete with that of Pinto & Co., but his only business in fact is that in relation to Pinto & Co. as herein described. . . . . He has had samples of cotton to show and has visited mills with them to get orders."

The case then sets out the form in which this business is carried through. It appears that there are two separate and distinct classes of this business. In class A Pinto & Co. inform Mr. Kummer that they have certain parcels of cotton for sale which he may dispose of at or above a certain price; in class B Mr. Kummer obtains offers from purchasers of cotton. He submits those offers to Pinto & Co., and they either accept or reject them at their pleasure. If they accept them they give instructions to Mr. Kummer, upon which he makes a contract with the purchaser. For that purpose he has provided himself with a printed form of contract note which contains a counterfoil. It is addressed from Mr. Kummer's business chambers at 27 Barton Arcade Chambers, Manchester. It is headed "Kummer & Leigh, Agents for Pinto & Co., Alexandria." It is addressed to the purchaser. It says: "We have this day sold to you on behalf and for account of Messrs. Pinto & Co. Alexandria"—so many bales, and so forth. Then the counterfoil, which is to be signed by the purchaser, is addressed to "Kummer & Leigh, Manchester." It says: "We herewith confirm purchase through you from Messrs. Pinto & Co., Alexandria, of"—so much cotton.

In those circumstances what is Mr. Kummer's position in reference to Pinto & Co.? Rowlatt J. has come to the conclusion that Mr. Kummer is merely a broker and that Pinto & Co. are doing business not in England but with England, through a broker. I cannot agree with that view. I see no evidence that Mr. Kummer's position in relation to Pinto & Co. was that of a broker. The word "broker" is used technically with reference to a class of persons who by the custom of certain markets are recognized as entitled to act for both purchaser and seller. That is the sense in which the word is used both in the statute and in the cases which interpret it. In my opinion Mr. Kummer is in the fullest

sense the agent of Pinto & Co. and he acts in these matters for them alone. This must be so in that part of the business which comes under class A. There Kummer communicated in the first instance with the purchaser that he had cotton for sale on certain terms; if the purchaser assented to those terms, then and there without further reference to Pinto & Co., the contract was made by Pinto & Co. or Kummer with the purchaser. Equally in class B the contract is made by Kummer, for until Kummer had communicated to the intending purchaser the acceptance of his offer there was no contract between Pinto & Co. and the purchaser at all.

Moreover it is clear that the contracts were all made in England. I cannot for a moment accept Mr. Latter's contention that because Kummer had to get Pinto & Co.'s authority before he made the offer in the first case or accepted the purchaser's offer in the second case, therefore Egypt and not England was the place where the contract was made. The part of the world from which the authority came does not affect the question, Where was the contract in fact made? The payment for the cotton is also made in England, for again I cannot accept Mr. Latter's contention that because, adopting an ordinary trade facility, Pinto & Co. discounted in Alexandria the bills which the purchaser accepted in England and had to pay in England, therefore Egypt is indicated instead of England as the place where payment for the goods is to be made under the contract.

In the face of these facts we are in my opinion compelled by the authorities to which I have referred to hold: (1.) that the contracts were made by an agent for Pinto & Co., and (2.) that they were made in England. Upon the question where the goods were deliverable I say nothing, because the answer depends upon the terms in the bills of lading, about which we have no information. But I do not think it is necessary to accede to Mr. Latter's suggestion that the case should be sent back for a further finding on that point, because it is sufficient for the determination of this case that the contracts were made in England by such an agent as Kummer and that payment was to be made in England.

C. A. 1924

WILCOCK v. PINTO & Co.

Bankes L.J.

Two other matters remain to be dealt with. The first has reference to *Crookston Bros.* v. *Furtado.* (1) I agree that no material distinction can be drawn between the facts of that case and those of the present case. But the decision of the Second Court of Exchequer in Scotland in that case seems to me to be inconsistent with the decisions of our Courts, including one decision of the House of Lords. In these circumstances *Crookston* v. *Furtado* (1) should not be followed at any rate by the English Courts. I may add that in my opinion that case seems also to be inconsistent with the later case of *Macpherson & Co.* v. *Moore* (2), to which our attention was also called.

The remaining question arises upon s. 31 of the Finance (No. 2) Act, 1915. That section commences by providing that s. 41 of the Income Tax Act, 1842, shall apply to non-resident persons in manner therein directed. Then by sub-s. 6: "Nothing in s. 41 of the Income Tax Act, 1842, ... shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent, not being an authorised person carrying on the non-resident's regular agency," &c. The question therefore is first whether Mr. Kummer is carrying on Pinto & Co.'s regular agency. I think he is. He is carrying it on in Manchester; "in your market," as the letter of September, 1919, describes it. Then is he an authorized person? In the part of the business described as class A there can be no doubt that he is; and little doubt in respect of the business in class B.

For these reasons in my opinion the view which the learned judge has taken in this case cannot be supported. The appeal of the Crown succeeds and must be allowed.

SCRUTTON L.J. I agree. The exact question we have to decide is whether Pinto & Co., Egyptian merchants, being non-resident in the United Kingdom, exercise a trade within the United Kingdom.

The question whether a person exercises a trade is a question of fact. As Jessel M.R. said in *Erichsen* v.

(1) 1911 S. C. 217. (2) 1912 S. C. 1315.

Last (1), "There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade." Among this multitude of things one is the making of contracts for the sale of goods out of which profits arise, and in considering whether a non-resident is carrying on a trade in this country one matter to which these Courts have attached preponderating importance is the question whether these contracts are or are not made in this country. When the Courts have found the contracts made in this country they have generally held the non-resident liable to income tax. When they have found the contracts made out of this country—for example, where the offer to buy is sent to the foreigner abroad and accepted by him there and the goods are handed there to the purchaser, they have held that the foreigner is not exercising a trade here, although he has an agent here who distributes price lists and sends proposals out to his principal abroad. The Courts have also attached importance to the fact, when they find it, that the goods are delivered in this country, and to the question whether the non-resident receives in this country the price of the goods sold. When the three events, the making of the contracts, the delivery of the goods, and the payment of the price have all taken place in this country, I think the Courts have always held that the non-resident is exercising a trade in this country.

I do not refer again to the passage in the judgment of Brett L.J. in *Erichsen* v. *Last* (2), which was cited without disapproval by Lord Herschell in *Grainger & Son* v. *Gough* (3) in the House of Lords, but I take two passages from the decision of this Court in *Werle & Co.* v. *Colquhoun* (4), which in its facts was very like this case. Lord Esher M.R. said there (5): "I have not a doubt that here there was a trade carried on in England, where the contracts were made. The making of contracts in such a case as the present is the whole substance and essence

(1) 8 Q. B. D. 414, 416.
(2) 8 Q. B. D. 418.
(3) [1896] A. C. 335.
(4) 20 Q. B. D. 753.
(5) 20 Q. B. D. 760.

C. A. 1924

WILCOCK v. PINTO & Co.

Scrutton L.J.

of the trade, and so the appellants exercise a business in England." And Fry L.J. said (1): "They do not make merely an occasional contract through these agents, but they are in the habit of making contracts through them. Those contracts are so made in England. Now, pausing there, it appears to me that a most important part, perhaps the most essential part, of the business of a champagne merchant was exercised by the appellants through the intervention of their agents within the United Kingdom"—that most important part being the making of the contracts for the sale of the wine which the foreign merchant was selling. Then in the House of Lords in *Grainger & Son* v. *Gough* (2), where the contracts were made abroad and the goods were delivered abroad, Lord Herschell said: "In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the principal test whether trade was being carried on in this country." Then he sets out without disapproval the passage from the judgment of Brett L.J. in *Erichsen* v. *Last*. (3) Lord Watson said (4): "I agree with the opinion expressed in that case"—*Erichsen* v. *Last* (5)—"by Cotton L.J., that whenever a foreigner, either by himself or through a representative in this country, 'habitually does, and contracts to do, a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business,' and that the profits or gains arising from these transactions in the United Kingdom are liable to income tax." And there is a similar passage in the judgment of Atkin L.J. in *Smidth & Co.* v. *Greenwood*. (6)

Therefore the English Courts have laid down the principle that the making of contracts in this country for the sale of goods by a non-resident through an agent is the exercising of a trade in this country. I think there is only one case to the contrary, the Scotch case of *Crookston* v. *Furtado* (7), to which Bankes L.J. has referred. In that case the contracts

(1) 20 Q. B. D. 761.
(2) [1896] A. C. 325, 335.
(3) 8 Q. B. D. 418.
(4) [1896] A. C. 340.
(5) 8 Q. B. D. 414, 420.
(6) [1921] 3 K. B. 583, 593.
(7) 1911 S. C. 217.

were made in England. They were c.i.f. contracts. The Scotch Courts thought that delivery under the contracts was to be abroad, though in fact payment was made in Scotland against delivery of bills of lading; and they thought that payment was to be made abroad, although the contracts provided that it should be by cash in London, and the proceeds were remitted abroad. Lord Ardwall said (1): "The fact that these contracts were concluded through agents in this country is not, in my opinion, conclusive of the question." Lord Salvesen, after citing the passages to which I have referred from the judgments of the English Courts, speaks of them as obiter dicta with which he does not agree. Lord Dundas takes the view I have endeavoured to express. As an English judge sitting in an English Court I am bound by the decisions of the Court of Appeal approved by the House of Lords.

Then what are the facts? Pinto & Co. carry on two classes of business. In the first class of business they authorize an agent, who has acted as their agent for seven years, to sell goods, sending him instructions that they have so much to sell and that he may sell it at, or I suppose above, a named price. It is agreed that the agent has a discretion in choosing the person to whom he sells. That seems to me to constitute the habitual making of contracts in this country by a regular agent. In the other class of business the agent obtains orders which he submits to Pinto & Co. abroad, who then authorize him to make a contract by accepting the order or instruct him to refuse the order. Equally, if the order is accepted, that results in a contract made in England. Secondly, with regard to delivery, Pinto & Co. draw upon the purchaser's bank in England a bill for the price, and then discount it with their own bank in Egypt, who then send it forward with the bill of lading attached, and present it to the purchaser's bank in England. That, with great respect to Lord Salvesen's view to the contrary, seems to me to be a delivery of the goods in England; and I base my opinion on the judgment of the Court of Appeal in *Mirabita* v. *Imperial*

(1) 1911 S. C. 223.

C. A. 1924

WILCOCK v. PINTO & CO.

Scrutton L.J.

Ottoman Bank. (1) Thirdly, the bank with whom Pinto & Co. have discounted the bill presents it to the purchaser's bank in England, and there receives the money; and that I take to be, again I think contrary to Lord Salvesen's opinion, payment in England. So then there are contracts habitually made in England—a fact sufficient in itself, as I think; habitual delivery of the goods in England, and habitual payment in England. These facts together make the exercise of a trade in England by Pinto & Co.

Rowlatt J. has made his judgment turn on the conclusion he drew that the agent in this country was merely a broker, and on the view that foreign principals trading through a broker in England do not really exercise a trade in England; but in my opinion when they have traded for seven years through the same agent in the way I have stated, it does not matter if the agent through whom they act is a broker. Therefore on the first part of the case I come to the conclusion that Pinto & Co. were exercising a trade in England.

But that does not determine this case, because Pinto & Co. are not assessed directly. They are assessed through an agent, Mr. Kummer. Before the Finance (No. 2) Act, 1915, no assessment could be made on a foreign principal through an agent who was not in receipt of the profits and gains. But in 1915 a change was made in the machinery for assessing non-resident principals. Sect. 31 of the Act of 1915, by sub-s. 1, allowed non-resident persons to be charged in the name of their agents although the agent had not the receipt of the profits or gains of the non-resident person. Sub-s. 2 positively enacted that a non-resident person should be chargeable in respect of any profits or gains arising whether directly or indirectly through an agency. It is not easy to see what that sub-section exactly means, but there is the decision of the House of Lords in *Greenwood* v. *Smidth & Co.* (2), that it is not a new charging enactment. It is part of the new machinery for charging but it does not impose any new charge. Then comes sub-s. 6, which is of importance in this case. It provides that: "Nothing in s. 41 of the Income

(1) (1878) 3 Ex. D. 164. (2) [1922] A. C. 417.

Tax Act, 1842 (as amended by any subsequent enactment or by this section), shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent, not being an authorised person carrying on the non-resident's regular agency." It is contended that Pinto & Co. may be chargeable, but that they cannot be assessed in the name of Kummer, because Kummer is either a broker or an agent not being an authorized person carrying on Pinto & Co.'s regular agency. Now what is the position of Kummer? For seven years he has been acting in relation to Pinto & Co. The document embodying the terms on which he originally began to act and any copy there may have been in possession of one of the parties, have been lost; but in the course of the agency, in 1919, Pinto & Co. wrote to Kummer the letter which follows; and I cannot do better than take it as a description of Kummer's position: "We beg hereby to confirm you [in] the agency of our firm for the sale of Egyptian cotton in your market." That appears to me clearly to make Kummer an authorized person carrying on Pinto & Co.'s regular agency. It is probably true that it does not bind Pinto & Co. to send Kummer any particular quantity of cotton or perhaps any cotton at all; but if, after writing that letter, Pinto & Co. sent cotton to any other agent or broker in the market, I think Kummer would have just cause for complaint.

In my opinion therefore, on the facts stated in the special case, Pinto & Co., being non-resident persons, exercise a trade in the United Kingdom, and are properly assessed in respect of the profits and gains of that trade in the name of Kummer, an authorized person carrying on their regular agency. For these reasons I think the learned judge came to a wrong decision and that the appeal should be allowed.

SARGANT L.J. I am of the same opinion. After the exhaustive judgments that have been delivered I have little to add. But as we are differing from the learned judge, I will say a few words on the main point in the case.

It is well established by definite decisions which have

C. A. 1924

WILCOCK v. PINTO & Co.

Sargant L.J.

received the approval of the House of Lords that, in determining whether a non-resident firm can be charged through an agent here, the principal point to consider is where the contracts are in fact made. In some cases, for example *Grainger & Son* v. *Gough* (1), the contracts were in fact made out of the jurisdiction, particulars only having been forwarded by the agent here to the principal abroad to enable him to decide whether he should make the contracts there. In the present case it is quite clear from the findings in the case and the documents appended to it, that the contracts were in fact made here by the agent here, and that there was no contract at all until that had taken place. There is no real foundation for the contention that there was some contract in existence by reason of communications made to the agent here by the intending purchaser and of further communications between the agent here and his principals abroad. It may very well be that business reasons connected with the sale of cotton, where the market fluctuates from hour to hour, make it impossible for a purchaser practically to give an option for a day or two to a vendor abroad to determine whether he will accept an offer to buy and make a contract to sell. It is probably necessary that contracts should be made on the spot at a definite moment in view of the state of the market at that particular time. These are clear indications pointing to the conclusion that a trade is being carried on here. I think also that payment was made here, at a bank at Bolton, notwithstanding that the vendors, who were entitled ultimately to be paid at Bolton, in fact realized that expectation by discounting their bills abroad, a fact which seems to me to have nothing to do with the question where by the terms of the contract payment was to be made. Probably delivery also was in fact made here, but apart from the question of delivery there is quite enough to compel us to the conclusion that a trade was being carried on here in England.

I agree that we must abide by the general current of authority in this country, which is well established in these

(1) [1896] A. C. 325.

Courts and has been approved by the House of Lords, and that we must decline to follow the Scotch case of *Crookston Bros.* v. *Furtado.* (1)

The learned judge decided against the Crown on the ground that Kummer was not an agent, but a broker. I would observe that the facts found by the Commissioners indicate clearly that in their opinion—and this is to some extent a question of fact—Kummer was an agent and not a broker. In cl. 2 of the case they say: "Pinto & Co. are cotton merchants in Alexandria in Egypt, and sell cotton to, or in, every part of the world. In September 1915 they arranged with the appellant that he should be their agent for the sale of their cotton in Manchester, and be remunerated with a commission of 1 per cent. on the sales, out of which he should meet his own expenses. Pinto & Co. sell some of their cotton in Liverpool through a broker." There the Commissioners, whose duty it is to find the facts, are differentiating distinctly between the sales made through Kummer as the recognized agent of Pinto & Co. in Manchester and the occasional sales made by Pinto & Co. in Liverpool through a broker. In my opinion therefore the learned judge was wrong on that point, and so the real foundation of his judgment gives way.

Upon the subsidiary point I agree entirely with my brethren in their construction of s. 31 of the Finance (No. 2) Act, 1915. Upon this point the learned judge did not come to any determination, and therefore I think it unnecessary to add anything.

Appeal allowed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Pritchard, Englefield & Co., for Boote, Edgar & Rylands, Manchester.*

(1) 1911 S. C. 217.

W. H. G.

C. A.

1924

July 18, 21, 22, 30.

[IN THE COURT OF APPEAL.]

BROCKLEBANK, LIMITED *v.* THE KING.

Emergency Legislation—Shipping Control—Licence to sell British Ship to Foreign Purchaser—Condition—Payment of Part of Price to Crown—Legality—Recovery of Money paid—Indemnity Act, 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1 (*b*).

The Shipping Controller, purporting to act under the authority of the Defence of the Realm Regulations, required as a condition of a licence to the suppliants to sell one of their ships to a foreign firm that they should pay a percentage of the purchase money to the Ministry of Shipping, and the suppliants paid the said percentage. On a petition of right to recover back the money so paid :—

Held, (1.) That the imposition of the condition was illegal, and that the payment was not a voluntary payment. (2.) That the petition of right was barred by s. 1, sub-s. 1, of the Indemnity Act, 1920. It was not open to the suppliants, by waiving the tort of the illegal exaction and suing for money had and received, to bring the case within para. (*b*) of the proviso to the sub-section as a "proceeding in respect of rights under contract," for the case fell within the exception to the proviso as being one in which a claim for compensation could have been brought under s. 2, sub-s. 1 (*b*), for a "direct loss . . . . by reason of interference with (their) business."

Bankes and Sargant L.JJ. (Scrutton L.J. dissenting) also held that the suppliants failed to bring the case within the proviso upon the further ground that the contracts referred to in para. (*b*) are limited to express contracts, and do not include the fictitious contract to repay money improperly extorted, the implication of which arises upon a waiver of the tort.

Judgment of Avory J. [1924] 1 K. B. 647 reversed.

APPEAL from Avory J. on the trial of a petition of right.

The suppliants T. & J. Brocklebank, Ld., a shipping company, were in November, 1919, desirous of selling four of their oldest ships, *Marwarri*, *Blackwell*, *Holywell*, and *Shadwell*, to foreign buyers. At that date such a sale could not lawfully be carried out without the licence of the Shipping Controller. The suppliants having applied for his licence, the Shipping Controller on November 28 refused to sanction the sale in the case of the three last-named ships, but offered to consider the proposal for sale in the case of the *Marwarri* "under the usual conditions." On inquiry by the suppliants what "the usual conditions" meant, they were told on

December 3 that they were (1.) that the owner must agree to place a contract for equivalent new tonnage, (2.) pay a sum of money to the Exchequer, which was usually 15 per cent. of the purchase price, and (3.) the purchaser must give a bank guarantee that he would trade the vessel to the United Kingdom for twelve months after transfer. The suppliants protested against condition 2, and the Shipping Controller justified it on the ground "That the difference in the British and foreign market value of a ship which is the result of State action should accrue to the State and not to private interests." To that the suppliants on December 8 replied: "Condition (2.). We note and though we cannot say we agree with the logic we can at least measure our financial strain."

On January 26, 1920, the suppliants wrote to the Shipping Controller that they had sold the *Marwarri* to an Italian firm for the sum of 240,000*l.*, less 3 per cent., and referred to an interview which they had had shortly before with the Secretary to the Ministry, at which they agreed to pay 15 per cent. of the sale price in satisfaction of condition 2. Thereupon the Shipping Controller gave his consent to the sale, and the suppliants paid to the Accountant-General of the Ministry of Shipping 34,920*l.* The Shipping Controller in exacting the said payment as a condition of his consent purported to act under reg. 39 C C of the Defence of the Realm Regulations. The suppliants then presented a petition of right, whereby they prayed: (1.) A declaration that the Shipping Controller was not entitled to demand payment of any sum as a condition of granting permission for the sale to a foreign owner of a British ship. (2.) Repayment to them of the sum of 34,920*l.*

Avory J. gave judgment for the suppliants.

The Crown appealed.

Sir Patrick Hastings A.-G. and *Russell Davies* for the appellant. This case does not come within the principle of *Attorney-General* v. *Wilts United Dairies, Ld.* (1), for the

(1) [1922] W. N. 217.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

money was not compulsorily extorted from the suppliants. The evidence goes to show that they paid it voluntarily. Before the negotiations with the Italian firm were entered into the suppliants knew perfectly well that they would have to pay 15 per cent. of the purchase price to the Exchequer, for they had been expressly told on December 3, 1919, that that was one of the conditions on which alone the Shipping Controller would consent to a transfer to a foreign purchaser. And though they at first protested against the impost, they in their letter of December 8 practically abandoned the protest in the words "We can at least measure our financial strain." By that they meant that as they now knew what they would have to pay they would fix their price to the purchaser accordingly. They fixed that price at 240,000*l*. If they can now get back the money paid to the Ministry of Shipping as money extorted colore officii, they will have received it twice. It is not suggested that the purchaser agreed to pay the 15 per cent., but there was evidence on the correspondence that the vendors did not object to pay it, because they expected to get it back from the purchaser in an increased price.

But even if the money was paid compulsorily it cannot be recovered back, for the Indemnity Act, 1920, is a bar to the recovery. (1) By s. 1, sub-s. 1, of that Act: "No action

(1) By the Indemnity Act, 1920, s. 1, sub-s. 1: "No action or other legal proceeding whatsoever . . . . shall be instituted in any court of law . . . . in respect of any act, matter or thing done . . . . during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty . . . . by a person holding office under . . . . the Crown in any capacity:

Provided that, except in cases where a claim for payment or compensation can be brought under s. 2 of this Act, this section shall not prevent—

(*b*) the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract. . . . . "

Sect. 2, sub-s. 1: "Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person not being a subject of a State which has been at war with His Majesty during the war and not having been a subject of such a State whilst that State was so at war with His Majesty—

(*b*) who has . . . . incurred or sustained any direct loss or damage by reason of interference with his . . . . business in the United Kingdom through the exercise or purported

or other legal proceeding "—which by sub-s. 2 includes a petition of right—" shall be instituted in any Court of law for . . . . or in respect of any act, matter or thing done " by an official of the Crown in good faith and in intended execution of his duty. The exaction of the 15 per cent. by the Shipping Controller is directly within the protection of that sub-section. For the suppliants it is contended that what they complain of is not an " act done " within the meaning of the sub-section, for the sub-section only applies to torts, and here they claim to waive the tort and sue for the money paid as money had and received to their use. They allege that the case falls within the proviso " that, except in cases where a claim for payment or compensation can be brought under s. 2 of this Act, this section shall not prevent (*b*) the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract," and that those words extend to the implied contract to refund the money which arose upon the waiver of the tort. The Crown does not accept that view, and contends that para. (*b*) of the proviso was intended to apply only to express contracts. In *Greenway* v. *Hurd* (1) the defendant, an excise officer, had received duties from the plaintiff after the Act of Parliament imposing them had been repealed, and had paid them over to his superior. In an action of assumpsit for money had and received it was held that the defendant was entitled to notice of action as for " a thing done in the execution of his office " ; in other words the plaintiff could not by waiving the tort deprive the defendant of the benefit of the statute requiring the notice. In the present case in the Court below the suppliants relied on *Umphelby* v. *M'Lean*. (2) There the defendant, a collector of taxes,

exercise, during the war . . . . of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder shall be entitled to payment or compensation in respect of such loss or damage; and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned," that is the War Compensation Court, and on the principles set forth in Part II. of the Schedule to the Act.

(1) (1792) 4 T. R. 553.

(2) (1817) 1 B. & Al. 42.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

made an excessive charge on the levy of a distress for arrears of tax. The plaintiff sued to recover the money back as money had and received, and it was held that the defendant was not entitled to notice of action under a statute which required such notice to be given in the case of an action brought for an "act done or fact committed" in pursuance of the Act. The Court took the view that the real cause of action was a non-feasance in not returning the money, and therefore did not come within the terms of the statute. But the judgments there were very short, and it does not appear on what grounds they proceeded, or how the Court distinguished *Greenway* v. *Hurd* (1), which was referred to in argument. *Waterhouse* v. *Keen* (2) is on the same lines as *Greenway* v. *Hurd*. (1) There the defendant had taken from the plaintiff, a coach proprietor, higher tolls than were authorized by a turnpike Act. The statute required notice of action to be given in the case of an action being brought "for anything done in pursuance of the Act." The plaintiff brought assumpsit for a return of the excess tolls. It was held that the defendant was entitled to notice of action. The action being substantially for a tort his right to notice was independent of the form of action. Bayley J. pointed out that, as the statute in addition to requiring notice of action also contained the usual condition that the action should be brought within six months, if the plaintiff could by waiving the tort alter the cause of action he could extend the period within which the action could be brought to six years, a result which could not have been intended by the Legislature. *Midland Ry. Co.* v. *Withington Local Board* (3) is to the same effect. There a portion of the expenses of paving a road was charged upon a frontager under s. 150 of the Public Health Act, 1875, under the mistaken belief that the road was not repairable by the inhabitants at large. In an action to recover the money back it was held that the defendants were entitled to notice of action under s. 264, which provided that no action should be brought "for anything done or intended to

(1) 4 T. R. 553. (2) (1825) 4 B. & C. 200.
(3) (1883) 11 Q. B. D. 788, 794, 796.

be done, or omitted to be done under the provisions of this Act" until after the expiry of a month's notice. Brett M.R. said: "It has been urged that the section does not apply when the action is for money had and received and the tort is waived. I think that view too narrow; and I am of opinion that wherever relief is sought in respect of anything done or omitted to be done under an intended exercise of the powers of this Act, this section applies. It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply. . . . . It may be said that this is a case of implied contract: I think that argument fallacious: no contract was intended to be entered into." And Lindley L.J. said: "The action is for taking and keeping money. . . . . Upon its true construction the taking of money is an act 'done.'" The above authorities, with the exception of *Umphelby* v. *M'Lean* (1), show that where money is illegally taken in the intended execution of an Act of Parliament the plaintiff cannot better his position by waiving the tort and suing on an implied contract.

But even if that contention is wrong the suppliants cannot succeed, for the case falls within the words of the first paragraph of the proviso, which except from its operation "cases where a claim for payment or compensation can be brought under s. 2 of this Act," and in the present case such a claim might be brought under sub-s. 1 (*b*) of that section for "direct loss . . . . by reason of interference with" the suppliants' "business." It is part of the business of a shipowner to sell his obsolete ships with the object of replacing them with newer ones, which was what the suppliants desired to do here.

Sir John Simon K.C. and *Hildesley* for the suppliants. This was not a voluntary payment. It appears from the correspondence that the suppliants protested against the exaction, and only paid it because they could not help

(1) (1817) 1 B. & Al. 42.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

themselves. The parties were not dealing on equal terms. The Shipping Controller demanded the money colore officii, and the suppliants could not get the licence on any other terms. And "if one party has the power of saying to the other 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing:" —per Abbott C.J., *Morgan* v. *Palmer*. (1) In *Steele* v. *Williams* (2) a parish clerk having possession and control of parish registers and being under a duty to allow persons concerned to view them and take extracts upon payment of the customary fee of one shilling for each search, charged an applicant 3*s*. 6*d*. for each extract taken, and it was held that this was an involuntary payment which could be recovered back. *Maskell* v. *Horner* (3), where market tolls were paid by a dealer in produce for many years to avoid a threatened seizure of his goods, although the exaction of the tolls was illegal, is to the same effect. In *Attorney-General* v. *Wilts United Dairies* (4), where the Food Controller had exacted, as a condition of his granting a licence to a dairy company to purchase milk, an undertaking by the company to pay him 2*d*. per gallon on milk purchased under the licence, on an information to recover money payable under that undertaking, it was held by the House of Lords that the claim could not be supported, for the imposition of the charge could only be properly described as a tax, which could not be levied except under statutory authority. In that case in the Court of Appeal (5) Atkin L.J. said: "The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid as money had and received to his use." Secondly, apart from any question arising under the Indemnity Act, this is a proceeding which can properly be brought against the Crown. It does not offend against the rule that a petition

(1) (1824) 2 B. & C. 729, 735.
(2) (1853) 8 Ex. 625.
(3) [1915] 3 K. B. 106.
(4) [1922] W. N. 217.
(5) 37 Times L. R. 884, 887.

of right will not lie for a tort. The foundation of the claim is contractual. Wherever property has come into a person's hands which does not belong to him, no matter how it came there, he becomes under an obligation quasi ex contractu to return it to the owner. That obligation does not the less exist because the defendant's possession of the property was brought about by a tortious act. And particularly is this the case where the property in question consists of money. The action for money had and received will lie, as was said by Lord Mansfield in *Moses* v. *Macferlan* (1), "for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation." But in such a case the foundation of the action is not the tort but the quasi contractual obligation to return the money, which is independent of the means by which the possession of it was obtained. If that is so there can be no objection to a petition of right to recover back money which has been obtained by the Crown through the tortious exaction of its servants. Thirdly, that obligation is not taken away by the Indemnity Act, 1920. That Act is a bar to proceedings only for positive acts of commission, "any act matter or thing done." It does not protect against proceedings for omissions, such as the neglect to return money belonging to the plaintiff. In *Midland Ry. Co.* v. *Withington Local Board* (2), the language of the section on which the case turned was very different from that in the Indemnity Act. There the words were "anything done or intended to be done or omitted to be done." The action there was for the omission, and it was for that reason that notice of action was necessary. *Umphelby* v. *M'Lean* (3) was there cited, but no member of the Court of Appeal expressed any disapproval of it. The two authorities are quite consistent, for the statute in *Umphelby's Case* (3) did not deal with actions for omissions. The language of the proviso to s. 1 of the Act, which excludes from its operation "proceedings in respect of any rights

(1) (1760) 2 Burr. 1005, 1012. (2) 11 Q. B. D. 788.
(3) 1 B. & Al. 42.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

under . . . . contract," are perfectly general, and there is no right to read in the word "express" before the word "contract." The present case does not fall within the exception to the proviso as being one in which a claim for compensation might be made under s. 2. For even if it is part of the business of a shipowner to sell ships, the claim for compensation, by the terms of Part II. of the Schedule, is not to include any loss "arising through the enforcement of any . . . . regulation of general . . . . application." And here the terms of the restriction imposed were that the suppliants were only to sell "on the usual conditions." And further the claim is to be limited to loss "by reason of direct and particular interference" with the claimant's business, and the imposition of a tax on the sale of the suppliants' ship could only be an indirect interference with their business.

Russell Davies was heard in reply.

Cur. adv. vult.

July 30. The following written judgments were delivered :—

BANKES L.J. By their petition of right the respondents complained that the Shipping Controller had, in January, 1920, illegally exacted from them a payment amounting to 15 per cent. upon the selling price of one of their steamers, as a condition of granting them permission to sell the vessel to an Italian firm. The Attorney-General, on behalf of the Crown, demurred to the petition on the ground that, by reason of the Indemnity Act, 1920, the Court had no jurisdiction to entertain the claim. An answer was also filed setting up a case that the demand was not an illegal one, and that the payment by the respondents was voluntary. The learned judge by whom the petition was tried decided in favour of the respondents, and the Crown appeals. The office of Shipping Controller was the creation of the New Ministries and Secretaries Act, 1915, which provided (inter alia) for the making of regulations under the Defence of the Realm (Consolidation) Act, 1914, conferring powers upon the Shipping Controller. Reg. 39 C C, made under this power, prohibited any one without the consent in writing from the Shipping Controller from

entering into, or offering to enter into, any agreement or any negotiations with the view to an agreement, for the purchase of any ship or vessel. Having regard to the language of the Indemnity Act, which applies to acts done by persons purporting to act under a regulation, as well as to acts done in accordance with a regulation, it is unnecessary to discuss the true construction of this regulation or to consider whether it should be held to include vendors as well as purchasers of vessels. In the present case the contention for the Crown is that whether the Shipping Controller acted rightly or wrongly in the matter, he purported to act under this regulation. What happened was this. The respondents were anxious to sell one of their vessels. They applied for the necessary permission. They were informed that no permission could be given except upon what were described as " the usual terms," which included a payment to the Exchequer of 15 per cent. of the purchase price. A firm of Italian buyers were prepared to give what appears from the respondents' description of the vessel to be a very attractive price. Negotiations were completed by January 26, 1920, on which date the respondents informed the Secretary of the Ministry of Shipping that they had sold the vessel to the Italian firm for 240,000*l.*, and they reminded the Secretary of an interview which had taken place earlier in the month, at which the respondents had agreed to pay to the Ministry 15 per cent. of the sale price in satisfaction of the condition imposed. In reply to this letter the respondents were informed that the Shipping Controller gave his permission to the purchase of this vessel by the Italian firm, and a request was made that a cheque for 36,000*l.* should be remitted, made payable to the Accountant-General of the Ministry of Shipping. The sum paid was 34,920*l.*, and it is for recovery of this amount that the petition of right is brought. The whole of the facts relating to the demand of this sum of money are contained in a few letters and in what passed at the above-mentioned interview. The learned judge came to the conclusion, after considering the evidence, and the authorities which were cited to him and to us, that the payment was not a voluntary one. I entirely agree with this view.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Bankes L.J.

The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless. I do not propose to go through the evidence or to discuss the authorities, as upon the materials before the Court it seems to me impossible to disturb the judge's conclusion on this point. Before dealing with the Indemnity Act it is necessary to consider whether the demand for the payment was an illegal demand or not. Reg. 39 C C in terms recognizes the granting of permission subject to conditions; it is said that the demand for a portion of the purchase price of a vessel as a condition of the grant of permission is perfectly lawful. In my opinion, this question is covered in principle by the decision of this Court, affirmed in the House of Lords, in the case of the *Attorney-General* v. *Wilts United Dairies*. (1)

I pass now to what seems to be the real question in the case—namely, whether the claim is barred by the Indemnity Act, 1920. The operation of the Act is confined to "acts matters and things done." The first point taken for the respondents is that what they complain of is not the act of the Shipping Controller in exacting the payment, but the refusal of the Crown to return the money so exacted. Avory J. accepted this argument on the authority of *Umphelby* v. *M'Lean*. (2) A number of cases were cited by the Attorney-General in support of this proposition, that it was the act of the Shipping Controller which was the governing feature in the case, and which formed the substantial part of the claimants' cause of action. In my opinion, none of the authorities are directly in point. In their order of date the cases referred to were *Greenway* v. *Hurd* (3); *Waterhouse* v. *Keen* (4); *Selmes* v. *Judge* (5); *Midland Ry. Co.* v. *Withington Local Board* (6); and *Cree* v. *St. Pancras Vestry*. (7) These were all cases in which the question was either whether the action had been commenced within the time limited by

(1) 37 Times L. R. 884; 38 Times L. R. 781.
(2) 1 B. & Al. 42.
(3) 4 T. R. 553.
(4) 4 B. & C. 200.
(5) (1871) L. R. 6 Q. B. 724.
(6) 11 Q. B. D. 788.
(7) [1899] 1 Q. B. 693.

statute, or whether the defendant was entitled to notice before action as prescribed by statute. In all of them it was material to consider whether the matter of complaint was an act done within the meaning of the particular statute, and in some of them whether it made any substantial difference that the plaintiff had elected to sue in assumpsit after waiving the tort. Some of the opinions of the learned judges who decided those cases are of value, though they cannot be decisive, as they are dealing with statutes passed for very different objects from that aimed at by the Indemnity Act. In *Waterhouse* v. *Keen* (1) the action was in assumpsit to recover back money illegally exacted, and the point taken was that the statute relied on applied only to acts done in pursuance of the Act. Both Bayley and Holroyd JJ. in giving judgment expressed a strong view that in such an action the Court must look rather to the substance than to the form of the action. Holroyd J. (2) says this: "The action in form is for money had and received to the plaintiff's use, but in substance it is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, under colour of the authority of the Act. The demanding and taking the toll was an act done in pursuance of the Act." In *Cree* v. *St. Pancras Vestry* (3) Bruce J., after dealing with the authorities, comes to the conclusion that although in the case before him the payment of the money was an essential ingredient in the cause of action, yet the cause of action depended upon the request for payment. The decision in the *Midland Ry. Co.* v. *Withington Local Board* (4), to which I shall have to refer in another connection, is to the same effect. These expressions of judicial opinion given, it is true, under different circumstances from those in the present case, confirm me in the view to which, apart from any authority, I should undoubtedly have come—namely, that in the present case an essential part of the claimants' cause of action consists of the illegal act of the Shipping Controller in exacting the payment as a condition of granting permission for the purchase of the

(1) 4 B. & C. 200.
(2) 4 B. & C. 213.
(3) [1899] 1 Q. B. 693.
(4) 11 Q. B. D. 788.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Bankes L.J.

vessel, and that it is impossible to get rid of that fact for the purpose of escaping the provisions of the Indemnity Act by electing to sue in assumpsit after waiving the tort. Sir John Simon argued that his clients were entitled for the present purpose to ignore the tort altogether, and to sue for the recovery of the money upon an implied contract to return money obtained as this money was. The case of *Umphelby* v. *M'Lean* (1) affords some justification for this contention. The claim in that case was to recover the amount of an excessive charge made by the defendants as collectors of taxes for their expenses upon a distress upon the plaintiff's property for an arrear of taxes. Objection was taken both on the ground of want of notice of action and that the proceedings were out of time. The excessive charge having been proved the trial judge directed a verdict for the plaintiff with leave to move. Counsel for the defendant in showing cause took two points—first, that the action was brought not in consequence of an act done, but of the defendants omitting to do that which they ought to have done, that is, return the money, and secondly, that the statute deals only with actions brought within six months after the "fact committed," and that no fact had been committed. The judgments as reported are not convincing. Lord Ellenborough C.J. bases his judgment upon the language of the statute. He merely says that in the case before him there was neither act done nor fact committed. The judgments of Bayley and Abbott JJ. are of no assistance as supporting the respondents' contention. If the decision is treated as one confined to the language of the particular statute it is unnecessary to consider whether it has any application to the present case. If it is relied on in support of the first branch of the counsel's argument who showed cause, I do not think that it supports the proposition, particularly having regard to the fact that Bayley J. was one of the judges who expressed an exactly opposite view in *Waterhouse* v. *Keen*. (2) In my opinion, the Indemnity Act does apply to the present claim, and that unless the claimants can bring themselves within the proviso to s. 1, sub-s. 1,

(1) 1 B. & Al. 42. (2) 4 B. & C. 200.

their claim is barred. The exemptions from the operation of the statute contained in the proviso include the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, but only in a case where a claim for payment or compensation cannot be brought under s. 2 of the Act. The material provisions of this section are contained in sub-s. 1 (*b*). In my opinion, the claimants have sustained direct loss or damage by reason of interference with their business through the purported exercise during the war of the power conferred upon the Minister of Shipping by reg. 39 C C. I cannot see how the action of the Shipping Controller can be otherwise described than as an interference with the claimants' business, which must include the disposing of obsolete ships. They have, therefore, prima facie, a claim for compensation. Sir John Simon attempted to avoid the position thus created by saying that the compensation, if any, falls to be assessed under Part II. of the Schedule, the language of which excludes the claim of the respondents, because the loss or damage has arisen from the enforcement of a regulation of general application. There appear to me to be two answers to this contention. The first is that the compensation payable to the claimants would fall to be assessed under sub-s. (*a*) of sub-s. 2 (iii.) and not under sub-s. (*b*). The second is that on further consideration I think that Lord Cave's view as to the construction of Part II. of the Schedule, as expressed in the *Moss Steamship Case* (1), is preferable to my opinion as expressed in the same case. (2) The conclusion at which I have arrived as to the claimants' right to compensation under the Indemnity Act is sufficient to dispose of this appeal. So much, however, has been said upon the question whether the present petition of right is a proceeding in respect of rights under a contract that I will give my opinion upon that point. It appears to me that what the Legislature is intending to preserve under the proviso is the case where parties have actually entered into a definite contract and one of them is seeking to enforce it, and not to a case where the law will allow a remedy arising

(1) [1924] A. C. 133, 141. (2) [1923] 1 K. B. 458.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Bankes L.J.

out of an assumed contract. The language of Brett M.R. in *Midland Ry. Co.* v. *Withington Local Board* (1) exactly expresses my view on this point. He says: "It has been urged that the section does not apply when the action is for money had and received and the tort is waived. I think that view too narrow; and I am of opinion that wherever relief is sought in respect of anything done or omitted to be done under an intended exercise of the powers of this Act, this section applies. It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute. It may be said that this is a case of implied contract: I think that argument fallacious: no contract was intended to be entered into; but where money was paid under a mistake of fact, the judges held that under the old forms of procedure it might be recovered back in an action quasi ex contractu. This is not a case where the parties intended to contract without saying so in express terms."

For these reasons the appeal, in my opinion, succeeds. The judgment must be set aside, and the Crown must have the costs here and below.

SCRUTTON L.J. A well known shipping company, T. & J. Brocklebank, Ld., bring a petition of right asking for the return of 34,920*l.* demanded from them by the Shipping Controller as a condition of his granting them a licence under which one of their ships could be purchased by a foreign buyer, which sum was paid over to the Exchequer. Avory J. has decided in favour of the petitioners, and the Crown appeals.

(1) 11 Q. B. D. 794.

While some points in the case are of considerable difficulty, some seem fairly clear. The demand of a payment to the Crown as a condition of granting a licence seems on the authority of the *Wilts United Dairies Case* (1) to be, "levying money for the use of the Crown without grant of Parliament" contrary to the Bill of Rights and, therefore, illegal. I was unable to see any distinction between the present case and that decision of the House of Lords. Further, I am clear that the payment by the petitioners in this case was not a voluntary payment so as to prevent its being recovered back. It was demanded by the Shipping Controller colore officii, as one of the only terms on which he would grant a licence for the transfer. It was a case where in Abbott C.J.'s language in *Morgan* v. *Palmer* (2): "One party has the power of saying to the other 'that which you require shall not be done except upon the conditions which I choose to impose,'" or, in the language of Littledale J. in the same case, "The plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence." In fact here the petitioners made several inquiries and protests as to the legality of the claim.

Next comes the question whether before the Indemnity Act the sum illegally exacted by the Shipping Controller could be recovered from the Crown by petition of right. It could clearly be recovered from the Shipping Controller in an action against him personally for an illegal act, or waiving the tort he could be sued in assumpsit. The common indebitatus count of money had and received to the plaintiffs' use was a regular remedy for money paid in consequence of an illegal demand colore officii: Bullen & Leake 3rd Ed., p. 50; *Morgan* v. *Palmer* (2); *Steele* v. *Williams*. (3) But it is said that the money was obtained by a wrong, and that the Crown could do no wrong, therefore petition of right could not lie for an alleged wrong, and, therefore, there was no tort to waive, and, therefore, I gather, it was argued that the Crown who had taken the money obtained by the

(1) [1922] W. N. 217.

(2) 2 B. & C. 729, 735, 739.

(3) 8 Ex. 625.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Scrutton L.J.

wrong of its servant into its Exchequer could keep the money so obtained. I hope this is not accurate, as it does not seem a very creditable position for the Crown by its advisers to take up. I do not see why the fact that the Crown could not be sued for damages for the wrong of its servants prevents proceedings by petition of right, based on the implied contract to return resulting from its taking possession of the money of the plaintiff obtained by the wrong of its servant. The executors of a dead man are not liable in damages for his tort, but may be liable if money or property has been taken from the plaintiff's estate and retained in the estate of the deceased. Bowen L.J. in his learned judgment in *Phillips* v. *Homfray* (1) explains this, and limits the application of waiving the tort to cases where independently of the wrong the plaintiff can make a title to relief, as he can in assumpsit where the defendant has taken the benefit of money illegally obtained from the plaintiff. Sir John Salmond, 4th Ed., p. 162, states the principle thus: "There is, however, one rule which may be laid down with confidence, when the defendant has by means of a tort become possessed of a sum of money at the expense of the plaintiff, the plaintiff may at his election sue either for damages for the tort or for the recovery of the money thus wrongfully obtained by the defendant, and this latter action (an action for money had and received by the defendant to the use of the plaintiff) is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent, and to have failed to pay it over to his principal." In my view, in *Steele* v. *Williams* (2), the rector, if he received the fees illegally demanded, could be sued in assumpsit as well as the clerk. And, in my opinion, the Crown could, before the Indemnity Act, be sued by petition of right in assumpsit for money received and kept by the Exchequer which had been obtained by an illegal demand of the servant of the Crown. I think it would be lamentable if this were not so.

So far the case is, in my opinion, clear. The difficulty

(1) (1883) 24 Ch. D. 439. (2) 8 Ex. 625.

arises from the language of the Indemnity Act, which undoubtedly in many cases has abolished petitions of right against the Crown and actions against the servants of the Crown with their common law results, and substituted proceedings before the War Compensation Court with different measures of relief. And it is said that proceedings in this case by petition of right have been barred by the Act, and the petitioners, having mistaken their remedy, have lost all right to redress, because they are out of time for a claim before the War Compensation Court. The Indemnity Act, by s. 1, prohibits any legal proceeding, including petition of right, in respect of any matter done or purported to be done by a servant of the Crown in good faith in the execution of his duty. This appears to me to cover the exaction of an illegal money claim for granting a licence, and any petition of right based on assumpsit on account of such demand. I do not think the retention of money by the Exchequer so illegally demanded by the Shipping Controller can be said not to be an "act matter or thing done." So far the petition of right is barred. But there are exceptions to the bar. There is a proviso that the section shall not prevent the institution of proceedings in respect of any rights under contract. The right to sue in assumpsit is an obvious right under contract. Assumpsit for money received to the use of the plaintiff is one of the common indebitatus counts by which "simple contracts express or implied resulting in mere debts" were sued for: Bullen & Leake, 3rd Ed., p. 35. The language of Brett M.R. in *Midland Ry. Co.* v. *Withington Local Board* (1) does not seem to me to touch this point. He was construing an act which made no express reference to contracts at all. We have here an act which expressly excludes actions on "contracts." It was argued that contracts must be limited to express contracts, and not allowed to cover "implied contracts based on fictions," but I can see no reason for such limitation of the ordinary meaning of the word "contract." Are the implied contracts to do a thing in reasonable time or that a ship is seaworthy to be excluded?

(1) 11 Q. B. D. 794.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Scrutton L.J.

And if it is said we are only to exclude "implied contracts based on fictions," we are legislating, not interpreting. But the exception itself is subject to an exception, "excepting cases where a claim for payment or compensation can be brought under s. 2 of this Act," and it is said that, as persons who have incurred or sustained any direct loss or damage by reason of interference with their property or business through the exercise or purported exercise of any power under any enactment relating to the Defence of the Realm can proceed in the War Compensation Court to recover payment or compensation for that damage, these petitioners who have had to pay money illegally demanded to obtain a licence to sell their ships to a foreigner can proceed for compensation in the War Compensation Court.

The position is rather curious. The petitioners desired to sell four ships to the foreigner. The Shipping Controller refused permission for three of the ships and granted it for one on condition (inter alia) of payment of the 34,920*l.* claimed in this case. The statutory position was that by the Act of 1915 no transfer of a British ship to a person not qualified to own it should be made without the consent of the Board of Trade. By the New Ministries and Secretaries Act, 1916 (6 & 7 Geo. 5, c. 68, s. 6), the Shipping Controller was appointed to take such steps as he thinks best for maintaining an efficient supply of shipping with such powers as he may obtain by Orders in Council transferring to him the powers of other Government departments or under Defence of the Realm Regulations. No Order in Council was made transferring the powers of the Board of Trade to the Shipping Controller, but in practice the Board of Trade did not give assent unless they had the consent of the Shipping Controller. The latter purported to act under reg. 39 C C of the Defence of the Realm Regulations, which forbade purchase of ships without his consent. When the petitioners applied to the War Compensation Court for compensation for interference with their business by the prohibition of sale of the three ships, they were refused on the grounds (1.) that the loss was caused by the provisions of the statutes and not by the action of the

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Scrutton L.J.

Shipping Controller. This, I think, was correct. (2.) That the petitioners were not purchasers, and, therefore, the Shipping Controller's refusal could not have been under reg. 39 C C. If this is right the Controller's imposition of conditions can hardly have been under 39 C C, but I think it was wrong as, in my view, the Controller purported to act under reg. 39 C C. (3.) That the refusal of the Shipping Controller was not under any regulation. I also doubt the accuracy of this. (4.) That a refusal to permit a prohibited transfer is not a direct and particular interference within the meaning of the Indemnity Act. This reason, if valid, would seem to apply to the present case. However, the question is not what the War Compensation Court would have done with this claim. I suspect they would have rejected it, and there would have been an appeal. The question is whether the action of the Shipping Controller comes within the language of s. 2 of the Indemnity Act. It is clear from the decisions of the House of Lords in the *Moss Steamship Co.* v. *Board of Trade* (1) and of this Court in *Black* v. *Admiralty Commissioners* (2), that these words have to be strictly construed, and from the decision of the House of Lords in *Attorney-General* v. *Royal Mail Steam Packet Co.* (3), that it is impossible to exclude from them claims in contract based on wrongful acts. But giving the best consideration I can to the meaning of the Indemnity Act I think to refuse permission to sell one's property except on the unjustified terms of paying a sum of money, is interference with property or business which causes direct loss or damage —i.e., the sum illegally demanded. I also think that the demand of money was made in purported exercise of a Defence of the Realm Regulation.

The result is that as a claim for compensation could be brought under s. 2 of the Indemnity Act, the exception to s. 1 of claims in contract does not apply and therefore, the petition of right is barred by s. 1 of the Indemnity Act, and the claim in the War Compensation Court would be barred

(1) [1924] A. C. 133. (2) [1924] 1 K. B. 661.
(3) [1922] 2 A. C. 279.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Scrutton L.J.

by lapse of time. I regret that the petitioners who, in my view, have suffered a wrong at law, should be deprived of their remedy by misunderstanding of the obscure language of the Indemnity Act, and I may be permitted to regret that the Government in these circumstances should keep money illegally obtained, but I can do no more than regret.

The appeal must be allowed with costs here and below.

SARGANT L.J. As regards the first two questions raised on this appeal, I am in complete accord with the judgment of Avory J. The illegality of the demand by the Shipping Controller is established by the decisions of this Court, and of the House of Lords, in the case of *Attorney-General* v. *Wilts United Dairies, Ld.* (1) And that the payment by the suppliants was made under compulsion, and was prima facie recoverable by them, follows from the principles of the judgments in *Morgan* v. *Palmer.* (2) It seems to me unnecessary to say more on these two points.

The real strength of the case for the appellant lies in the protective provisions of the Indemnity Act, 1920. In my judgment, and here I think I am not differing from the learned judge, the illegal exaction by the Shipping Controller of the percentage in question was " an act . . . . done in good faith and done or purported to be done in the execution of the duty " of the Shipping Controller, and so is prima facie within the exemption of s. 1, sub-s. 1, of the Act; and accordingly the Crown is protected, unless the case can be brought within the saving terms of the proviso to s. 1, sub-s. 1. Now as to this the argument on behalf of the Crown is two-fold. In the first place, it is contended before us, as it was contended before the learned judge, that the case is one in which a claim for payment or compensation could have been brought under s. 2 of the Act, and accordingly that the case is one within the exception to the proviso to s. 1, sub-s. 1; and, in the second place, it is argued before us, for the first time, that the present proceedings are not on their true view proceedings in respect of " rights under or

(1) [1922] W. N. 217. (2) 2 B. & C. 729.

alleged breaches of contract" within sub-head (*b*) of the proviso.

As regards the first of these arguments the learned judge has found against the Crown on the ground that there is not sufficient evidence of the suppliants having suffered any loss, and accordingly that a claim for compensation could not be brought by them under s. 2 of the Act. But I cannot agree with this reasoning, which seems to me to destroy altogether the initial fundamental right of the suppliants to recover anything whatever. In my judgment, it is a condition precedent of any right on the part of the suppliants to recover from the Crown in the present proceedings that they should have suffered loss from the illegal exaction of the Shipping Controller, and the absence of proof of that loss is as fatal an objection to any claim in the present proceedings, as to a claim for payment or compensation under s. 2 of the Act.

An additional argument has, however, been put forward by the suppliants to show that their claim was not capable of being brought under s. 2 of the Act. They say, and say truly, as a major premiss that, having regard to Part II. of the Schedule to the Act, those losses can only be recovered under s. 2 which result from a direct and particular interference with the business or property of claimants. And they allege by way of minor premiss that, even if the exaction by the Shipping Controller was a direct interference with the business of the suppliants, it was nevertheless an interference resulting from a general code or regulation of the Shipping Controller, and so cannot properly be regarded as a "particular" interference such as to justify an award of compensation under s. 2. In my judgment, however, this argument fails as to its minor premiss. It is true that in exercising his discretion as to permitting the sale of the *Marwarri* the Shipping Controller professed to and did deal with the suppliants in accordance with certain general principles enunciated in the Secretary's letters of December 3 and 5, 1919. Any fair exercise of discretion in a great number of somewhat similar cases must almost necessarily involve the formulation of certain general principles of the

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Sargant L.J.

kind, as a guide to the conduct of the authority exercising the discretion. But nevertheless the actual decision of the Shipping Controller in the suppliants' case, involving as it did the waiver of the first of the three conditions—namely, that as to new construction, and the fixing of the percentage at the maximum rate of 15 per cent.—was in my judgment a particular individual decision, amounting to a direct particular interference with the suppliants' business by imposing as conditions on the sale of the *Marwarri* that she should trade with the United Kingdom for a year, and that 15 per cent. of the purchase money should be paid to the Shipping Controller. The reasoning of this Court in the recent case of *Black* v. *Admiralty Commissioners* (1), seems to support this view. It was there intimated that as against a claim by the builders as distinguished from the shipowners the action of the Ministry would have been held to be a direct particular interference.

As against this view, however, attention was called to the fact that in the War Compensation Court the suppliants had attempted to obtain compensation for the refusal of the Shipping Controller to allow the sale of three other vessels of theirs similar in many respects to the *Marwarri*, and had had their claim dismissed. But that claim was obviously quite different from the present. There the Shipping Controller had kept entirely within his strict legal position by simply refusing permission, and any loss to the suppliants arose from the general restriction imposed on the sale of vessels under statutory authority, and could not properly be attributed to a mere discretionary refusal of the Shipping Controller to remove that restriction in particular cases. In my judgment, therefore, the suppliants' present claim is barred by s. 1 of the Indemnity Act, 1920, as having been one that could have been brought under s. 2 of the Act.

The second contention of the Crown—namely, that, to put it shortly, the present claim is not "in respect of rights under contract"—was not raised in the Court below; but it is one of some importance and deserves careful

(1) [1924] 1 K. B. 661.

consideration. To appreciate it, one must first of all realize the way in which the suppliants put their claim. This is, as I understood Sir John Simon's argument, as follows. The claim against the Shipping Controller himself was in tort. But the Crown cannot commit an actionable tort, and the Shipping Controller cannot have been the agent of the Crown for this purpose. Hence the only cause of action of the suppliants against the Crown arose by reason of the Crown having received from the Shipping Controller the proceeds of his tort with notice thereof, or, at any rate, without being a purchaser for value without notice: see *Calland* v. *Loyd* (1); *Heilbut* v. *Nevill*. (2) And this sole remedy is by way of assumpsit, that is by virtue of at least an implied contract. Therefore, it is said, the case falls within sub-head (*b*) of the proviso to s. 1, sub-s. 1, of the Act; and, proceedings having been instituted within one year from the termination of the war the right of the suppliants is not barred. Even if, which is not admitted, an action against the Shipping Controller himself, had he not parted with the money, could not have been sustained, because the first and principal remedy against him was in tort, and therefore was barred by the Act, and even if therefore the action against him on an implied contract could only have been pursued secondarily, and upon a waiver of tort, the case against the Crown on implied contract is said to be stronger, because there never was any other remedy against the Crown.

To this it is replied by the Crown that whether the claim in implied contract is pursued against the Crown or, had the proceeds been retained by him, against the Shipping Controller, the main and necessary constituent of the cause of action is tort; that, unless the suppliants pleaded (as they did in fact plead) and proved this tort, their action whether against the Crown or against the Shipping Controller must necessarily fail; that according to any ordinary use of language there never was in fact any contract at all between the suppliants and the Crown; that it was contracts in the

(1) (1840) 6 M. & W. 26. (2) (1870) L. R. 5 C. P. 478.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Sargant L.J.

ordinary sense that were being dealt with by sub-head (*b*) of the proviso; and that the main and principal cause of action—namely, that against the Shipping Controller for tort—having been barred by the general words of s. 1, it would be defeating the general purpose of the section to preserve either against the Shipping Controller (had he retained the proceeds) or, as things are, against the Crown an alternative remedy based upon an implied contract or quasi contract merely introduced by and resting on a legal fiction.

In my judgment this reply of the Crown is sound and should prevail. I cannot think that the saving by sub-head (*b*) of "rights under or alleged breaches of contract" extends to anything but definite substantive contracts, or includes rights arising from implications of contract under legal fictions, particularly when these implications arise incidentally from transactions which in themselves and primarily constitute torts, and are in that regard dealt with by the Act and rendered non-actionable. And this view of the matter derives considerable support from the decisions in *Waterhouse* v. *Keen* (1) and *Midland Ry. Co.* v. *Withington Local Board.* (2) It is no doubt true that in the latter case the bar extended not only to acts but to omissions, while in the Act of 1920 "acts matters or things done" alone are mentioned and protected. But here the exaction of the percentage was clearly an act or thing done, and I cannot assent to Sir John Simon's proposition that the cause of action against the Crown was its omission to refund the percentage. If that argument were sound the cause of action in the case of any tort might be said to be the omission to make good the loss occasioned thereby. The case of *Umphelby* v. *M'Lean* (3), which was much pressed by the respondents, is not so close to the present case as the two just previously referred to. And, apart from the rather unsatisfactory and conflicting character of the reasons given for the decision, it is to be observed that the language of the Act there was very different from that of the Act now in question. The

(1) 4 B. & C. 200. (2) 11 Q. B. D. 788.
(3) 1 B. & Al. 42.

Act there gave no general protection, but barred claims against the parish only and not against the defendant; and further stress was laid in at least one of the judgments on the use in the Act of the word "amends," as indicating that any claim barred must have been one for unliquidated damages only, and so could not include a claim against the parish for the definite ascertained amount actually received by them.

C. A. 1924

BROCKLEBANK, LD. v. THE KING.

Sargant L.J.

On both these grounds I think that the Indemnity Act applies, and that the appeal should be allowed with costs.

Appeal allowed.

Solicitor for the Crown: *Solicitor to Board of Trade.*

Solicitors for suppliants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

J. F. C.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A. 1924 *Oct.* 27.

THE KING *v.* JAMES ST. ALBAN PAUL.

Criminal Law—Habitual Criminal—Discretion as to Sentence of Preventive Detention—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-s.* 1.

Before a sentence of preventive detention can be passed three things are requisite: first, that the prisoner shall have been convicted of being a habitual criminal; secondly, that the Court shall have taken such a view of the substantive crime of which the prisoner has then been convicted as to think it right, by reason of that crime and not for any other reason, to pass a sentence of penal servitude; and, thirdly, that the Court, in the exercise of its independent discretion, shall be of opinion that by reason of the criminal habits and mode of life of the prisoner it is expedient for the protection of the public that he should be kept in detention for a lengthened period of years.

Sentence of preventive detention quashed where the judge at the trial had not exercised such independent discretion, but had treated the sentence as necessarily following the conviction as a habitual criminal.

APPEAL against a sentence of preventive detention.

The appellant, James St. Alban Paul, was convicted at the Central Criminal Court, on his own confession, before the

C. C. A. 1924

REX v. JAMES ST. ALBAN PAUL.

Common Serjeant on September 30, 1924, with one Sidney Joseph Baxter, of housebreaking on August 4, 1924. He was also charged as a habitual criminal, to which charge he pleaded not guilty, but was convicted by the jury. On the latter verdict being given the appellant's counsel asked the Common Serjeant to read a written statement by the prisoner, and the latter also asked to be heard, but the Common Serjeant declined to read the statement or hear the appellant, saying: "No, I must deal with him as a habitual criminal," and then proceeded to sentence him to three years' penal servitude and to five years' preventive detention.

The appellant appealed against the sentence of preventive detention.

Appellant in person.
Arthur Bryan for the Crown.

The judgment of the Court (LORD HEWART C.J., SHEARMAN and SALTER JJ.) was delivered by

LORD HEWART C.J. The appellant was indicted at the Central Criminal Court, together with one Baxter, for breaking and entering a dwelling-house and stealing some silk therein. He was also charged with being a habitual criminal. Three previous convictions were charged and proved in compliance with s. 10, sub-s. 2 (*a*), of the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), and other previous convictions were also proved. It appeared that having served the sentence imposed on him in respect of his last conviction previous to the commission of the substantive crime in the present case, he was released from prison on December 6, 1923, on licence. About February 21, 1924, he obtained the situation in which he was working when arrested on the present charge, and he was earning good wages. He had served in the war, and was in receipt of a pension of 12*s.* per week. With regard to the substantive crime, it appeared that he had been drinking with Baxter, who told him he was going to do some business, and asked the appellant to go with him. Appellant at first refused, but eventually consented, and committed the

housebreaking offence to which he had pleaded guilty. His employer stated that he had always been aware that the appellant was an ex-convict, but that he was willing to take him back. Notwithstanding these facts, and the interval which had elapsed between the date of his release from prison, December 6, 1923, and the commission of the substantive crime on August 4, 1924, the jury convicted him as a habitual criminal. It was essentially a question of fact for them, and it is impossible to say that there was no evidence upon which the jury could properly come to that conclusion. But that does not by any means conclude the matter. It cannot be too clearly recollected that the Prevention of Crime Act, 1908, is very careful to distinguish between the duty of the jury and that of the Court. By s. 10, sub-s. 1: "Where a person is convicted on indictment of a crime . . . . and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years," may pass a further sentence of preventive detention. In other words three perfectly distinct steps are necessary in order that a prisoner may be sentenced to preventive detention. First, he must be found to be or admit that he is a habitual criminal; secondly, the Court must take such a view of the substantive crime of which he has then been convicted as to think it right by reason of that crime, and not for any other reason, to pass a sentence of penal servitude; and, thirdly, the Court must be of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years. What happened in the present case was that the jury found the appellant to be a habitual criminal, and the Common Serjeant passed a sentence of three years' penal servitude, which is not suggested to have been too severe. Then came the question, and the very important question, whether the Common Serjeant was of opinion that

C. C. A. 1924

REX v. JAMES ST. ALBAN PAUL.

by reason of his criminal habits and mode of life it was expedient for the protection of the public that the appellant should be kept in detention for a lengthened period of years. The Common Serjeant, when the jury returned their verdict that the appellant was a habitual criminal, declined to hear anything more, and saying: "I must deal with him as a habitual criminal," sentenced him to a further five years' preventive detention. The Common Serjeant, in common with some others, seemed to think that a sentence of preventive detention must follow a conviction as a habitual criminal as a matter of course. But that is not the case. The judge must still exercise his independent discretion on the question. It does not appear that the Common Serjeant did exercise an independent discretion in the present case. Therefore, while the conviction for the substantive crime, the conviction as a habitual criminal and the sentence of penal servitude must stand, the sentence of preventive detention will be quashed.

Appeal allowed.

Solicitor for the Crown: *Director of Public Prosecutions.*

W. L. L. B.

REGENT'S CANAL AND DOCKS COMPANY *v.* GIBBONS.

1924
Oct. 14, 15.

[1923. R. 2689.]

Bridge—Repair—Covenant to repair and maintain until "taken over" by Local Authority—Road passing over Bridge declared to be a Highway repairable by Inhabitants at Large—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 149, 152.

Sect. 4 of the Public Health Act, 1875, defines "street" as including "any highway . . . . and any public bridge (not being a county bridge) and any road . . . ."

By a deed made in 1900 one G. obtained liberty to construct a bridge over a watercourse belonging to two canal companies and to carry a road thereover, and he covenanted to repair and maintain the bridge until the road and bridge were "taken over" by the local authority. In 1915 the local authority by a notice under s. 152 of the Public Health Act, 1875, declared the road which passed over the bridge to be a highway repairable by the inhabitants at large and the road thereupon, by virtue of s. 149 of the same Act, became vested in the local authority. No steps were taken by the local authority to declare the bridge to be a county bridge:—

Held, that the local authority had "taken over" within the meaning of the covenant not only the road but the fabric of the bridge, and therefore that no obligation now rested upon G. or his representatives to repair and maintain the bridge.

ACTION tried by Swift J.

The plaintiffs claimed a declaration that the defendants, the executors and trustees of Frederick Gibbons, were liable to repair and maintain a certain bridge over a stream or watercourse from the Brent reservoir used as a feeder for the supply of the Grand Junction Canal and the plaintiffs' canal.

In 1900 Frederick Gibbons, the owner of land in Willesden, proposed to develop the land for building purposes. To do this it was necessary to make a road between a then existing highway known as Bridge Road and another existing highway known as Woodhayes Road and to construct a bridge over a canal feeder which ran through his estate. The feeder belonged to the Grand Junction Canal Company, and over it the plaintiffs, then known as the North Metropolitan Railway and Canal Company, had certain rights. Mr. Gibbons obtained permission from those two companies to construct the bridge,

1924

REGENT'S CANAL AND DOCKS COMPANY v. GIBBONS.

in consideration of making certain payments and entering into certain covenants contained in an indenture of May 29, 1900, the material clauses of which were the following :—

Clause 2 : " The said Frederick Gibbons having paid " [certain sums to the two companies] " shall be at liberty at any time after the date hereof to construct a bridge over the said feeder . . . . for the purpose of carrying the said road over the same and to continue and maintain the same until the said road and bridge are taken over and maintained by the local authority."

Clause 3 : " The said Frederick Gibbons shall be at liberty at any time after the date hereof to construct a sewer under the portion of the said feeder lying beneath the said land . . . . and to continue and maintain the same until such sewer is taken over by the local authority."

Clause 4 : " The said Frederick Gibbons shall make and construct the said bridge in accordance with plan elevation and sections shown on the plan No. 2 drawn hereon which have been approved by or on behalf of the said companies and of the materials therein specified and to the satisfaction of their respective engineers or traffic managers . . . . and the said Frederick Gibbons shall make and construct the said sewer in accordance with plans and specifications to be previously submitted to and approved by or on behalf of the said companies and to the satisfaction of their respective engineers or traffic managers . . . . and the said Frederick Gibbons shall make good to the satisfaction of the said engineers or traffic managers all damage that shall in any way be caused to the said feeder and bank thereof by or in consequence of the construction of the said bridge and sewer or either of them and shall until the said road bridge and sewer are taken over and maintained by the local authority well and substantially repair and maintain the said bridge and sewer to the satisfaction of the said engineers or traffic managers."

Clause 7 : " The said Frederick Gibbons shall until the said road bridge and sewer are taken over by the local authority as aforesaid pay to each of the said companies on January 1

in every year as annual rent or acknowledgment for the right and liberties hereby granted the sum of one shilling in respect of the said bridge and one shilling in respect of the said sewer to be constructed by him as aforesaid."

Mr. Gibbons duly constructed the road bridge and sewer, the bridge being erected wholly on land belonging to the Grand Junction Canal Company.

Mr. Gibbons died in 1914, and up to the time of his death he discharged the obligations imposed upon him by the covenants in the deed. After his death, the defendants, his executors, for a time continued to discharge the same obligations, but on May 31, 1915, the Willesden Urban District Council, by notice under s. 152 of the Public Health Act, 1875, declared the road which passed over the said bridge to be a highway repairable by the inhabitants at large, but the Council took no steps to declare the bridge to be a county bridge. By virtue of the notice the road carried by the bridge became vested in the said Council under s. 149 of the Public Health Act, 1875. The defendants then said that they were no longer under any obligation to repair or maintain the bridge.

Macmorran K.C. and *Hilbery* for the plaintiffs. Notwithstanding that in s. 4 of the Public Health Act, 1875, the word "street" is defined as including "any public bridge (not being a county bridge)," all that became vested in the local authority by virtue of the notice under s. 152 of the Act was merely the road as distinct from the fabric of the bridge: see *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1), where Lord Watson said this (2): "Keeping in view, then, that the sole object of vesting streets, and the materials of which they are composed, in district boards is to enable them effectually to perform their statutory duties in relation to the streets, I cannot suppose that the Legislature, in enacting that the word 'street' shall 'apply to and include' any bridge, intended to vest in the board anything more than the street which is carried or supported by the bridge." Again, in *Tunbridge Wells Corporation* v. *Baird* (3) it was clearly laid

(1) (1883) 8 App. Cas. 687. (2) Ibid. 692. (3) [1896] A. C. 434.

1924

REGENT'S CANAL AND DOCKS COMPANY v. GIBBONS.

down that the Public Health Act, 1875, which by s. 149 vests certain streets in the urban authority, does not vest the subsoil. In view of these decisions it is clear that the liability for the maintenance of the bridge continues to rest on the defendants by virtue of the deed of May 29, 1900, the bridge not having been "taken over" by the local authority.

Konstam K.C. and *E. J. Naldrett* for the defendants. Sect. 4 of the Public Health Act, 1875, defines "street" as including "any highway and any public bridge (not being a county bridge)." That must mean the whole bridge, and in view of that, when the local authority took over the road passing over the bridge they took over what was necessary to support it—namely, the fabric of the bridge. That is clearly what the parties to the deed of May 21, 1900, contemplated. There is nothing in either of the cases relied upon by the plaintiffs to limit the interpretation of s. 4 of the Public Health Act, 1875. Neither case was decided with reference to the liability to repair.

Macmorran K.C. replied.

SWIFT J. stated the facts and continued: The deed of May 29, 1900, refers to the sewer, the road and the bridge being "taken over" by the local authority. The words "taken over" are not particularly appropriate for the purpose of describing what was intended by the parties, for, as has been pointed out, a sewer is not "taken over," because as soon as it is made it vests in the local authority. Nor is a bridge "taken over." And although the covenant may be read as saying that the highway may be taken over by the local authority so as to be repairable by the inhabitants at large, I am not quite sure that that is the most apt phrase to describe what is effected by a notice under the Public Health Act. It seems to me perfectly plain, however, that what the parties meant was that Mr. Gibbons should be responsible for the maintenance of the road and bridge up to the time when the local authority obtained dominion over them so as to make them public property as distinguished from the private property of Mr. Gibbons. Is then the bridge to be regarded

as the private property of Mr. Gibbons, as to which he has made a bargain with the parties to this deed that he will keep it in repair and maintain it ? By their notice of May 31, 1915, the local authority did everything necessary and possible to make that part of the street, which Mr. Gibbons had laid out, into a highway repairable by the inhabitants at large, and that part of the street runs over and includes the bridge which Mr. Gibbons made. By s. 4 of the Public Health Act, 1875, the word " street " is defined as including a bridge, and I can see no reason why, in speaking of that part of the street which the local authority took over by its notice of May 31, 1915, there should be excluded from it the bridge which formed part of it. Mr. Macmorran has argued that the highway is only that portion of the street which is used by the public in passing along, that is to say, the surface of the highway and so much beneath it as is necessary for the maintenance of the surface. I cannot follow why, when one is talking of a " bridge," one shall put out of the definition the piers which carry the bridge. When the Public Health Act, 1875, includes a bridge within the definition of " street," it seems to me that the piers which support the surface of the highway over which the public pass and repass are as much a part of the bridge and as much included in the word " bridge " as the surface over which the public pass. If a bridge for the purpose of a highway is taken by the local authority it seems to me that the whole of the bridge is taken. Mr. Macmorran fortified his very powerful argument by referring to *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1), and called my attention to the language used there, which would seem to imply that the supports of the surface of the bridge never became vested in the local authority. That case, which had reference to a bridge erected by the railway company under and in pursuance of the Railway Clauses Consolidation Act, 1845, was not concerned with the question of the repair of the bridge, and does not in my opinion compel me to come to the conclusion in this case that the local authority have not taken

(1) 8 App. Cas. 687.

1924

REGENT'S CANAL AND DOCKS COMPANY v. GIBBONS.

Swift J.

over the whole of the bridge when they took over the highway; but be that as it may, it seems to me that the event has happened which the deed of May 29, 1900, contemplated. The local authority have done everything which any one can have contemplated that they would do, and I think they have done that which the parties agreed was to relieve Mr. Gibbons from any further liability. It may be that some day a dispute will arise and will have to be decided between the canal company and the other persons interested in this bridge as to the liability to repair it, but I am satisfied, having regard to this agreement between the parties, that the defendants are no longer bound to repair it. In those circumstances the declaration asked for must be refused and the action dismissed.

Judgment for defendants.

Solicitors for plaintiffs: *Coward & Hawksley, Sons & Chance.*
Solicitors for defendants: *Lawrence, Graham & Co.*

J. S. H.

C. A.

1924

May 21, 22, 23; *June* 5.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* AVELINO ARAMAYO AND COMPANY.

AVELINO ARAMAYO AND COMPANY *v.* OGSTON.

ECCOTT *v.* ARAMAYO FRANCKE MINES, LIMITED.

Revenue—Income Tax—Company resident in England—Management Abroad by Local Board—Agent in England—Special Commissioners—Assessment of Local Board in Name of Agents—Appeal by Company—Special Case—Waiver—Information—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sch. D, First Case, Fifth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. D—Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 59, *sub-s.* 4—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 31, *sub-s.* 6.

An English company owning and working mines in Bolivia applied under s. 131 of the Income Tax Act, 1842, to be assessed on their profits and gains by the Commissioners for the special purposes of the Income Tax Acts. The business of the company was carried on and managed

C. A.

1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO.

AVELINO ARAMAYO & CO. v. OGSTON.

ECCOTT v. ARAMAYO FRANCKE MINES, LD.

by a local board in Bolivia and sales of the company's minerals were made in England through a firm of agents in London. The special Commissioners made an assessment upon the local board in Bolivia in the name of the London firm. The firm, without objecting to the jurisdiction of the special Commissioners or the form in which they had been assessed, appealed from the assessment upon the grounds that they were general commission agents within the meaning of s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915, and did not carry on any regular agency of the company or the local board, and that no trade was carried on in the United Kingdom by the company or the local board; and, upon the special Commissioners confirming the assessment the firm required them to state a special case for the opinion of the Court. The Attorney-General on behalf of the Crown filed an information under s. 59, sub-s. 4, of the Taxes Management Act, 1880, to recover from the firm the tax assessed by the special Commissioners. The information and the special case were heard together and the learned judge quashed the assessment, but gave judgment for the Crown on the information.

Appeals from these decisions having been heard together:—

Held (1.) that the firm, having submitted to the jurisdiction of the special Commissioners by appealing from and demanding a special case upon the assessment, could not contend that the assessment was void as having been made not at their request nor at the request of the local board, but at the request of the company; but

Held (2.) that the assessment was bad, inasmuch as there was no power to assess foreign agents of an English company in the name of an agent.

Held (3.) that the information being based upon a bad assessment must be dismissed with costs of the appeal, but without costs in the Court below, inasmuch as the assessment stood at the time when the information was filed.

APPEALS from decisions of Rowlatt J. upon an information by the Attorney-General against a firm of Avelino Aramayo & Co. and upon two cases stated by the Commissioners for the Special Purposes of the Income Tax Acts as hereinafter appearing.

Aramayo Francke Mines, Ld. (hereinafter called "the company"), was registered in England under the Companies Acts in the year 1906 as a private limited company under the name Aramayo Francke & Co., Ld. In 1909 it became a public limited company with new regulations, and in 1912 it assumed the name of Aramayo Francke Mines, Ld. The main object of the company was to take over as a going concern the business of general merchants and mine owners theretofore carried on by the firm of Aramayo Francke & Co. in Bolivia. This firm (hereinafter called "the Bolivian firm") were the

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO.
AVELINO ARAMAYO & CO. v. OGSTON.
ECCOTT v. ARAMAYO FRANCKE MINES, LD.

owners of certain mines in Bolivia from which were obtained bismuth, wolfram, tin, silver, copper, and antimony. The partners in the firm were Mr. Felix Avelino Aramayo, who was the chief partner, and seven other persons. The said F. A. Aramayo was the original managing director of the company and continued in that office down to the end of the year of assessment in question in this appeal.

The firm of Avelino Aramayo & Co. (hereinafter called "the London firm") was established by the said F. A. Aramayo in 1901 to carry on the business of general merchants and agents in London. The said F. A. Aramayo was the chief partner in the firm. From 1901 to December 17, 1906, this firm acted as sole general, commercial, and financial agents of the Bolivian firm. On December 17, 1906, an agreement was entered into between the company and the London firm whereby the London firm were appointed the first sole financial, commercial, and general agents of the company in the United Kingdom, among other parts of the world, to perform the duties and exercise the powers which they had been accustomed to perform and exercise for the Bolivian firm before its incorporation. The agreement was to be in force for ten years. The London firm was to be entitled to receive, and the company agreed to pay, the commission on sales and other the benefits, interests, and emoluments which the firm had been accustomed to receive from the Bolivian firm.

On July 6, 1916, it was agreed between the parties that the agreement of December 17, 1906, should be continued with certain modifications relating to the payments to be received by the London firm. No fixed term was agreed to for the duration of the renewed agreement.

By special resolutions passed on March 8, 1917, and confirmed on March 26, 1917, the company amended its articles of association by repealing certain clauses therein and replacing them by new clauses, which provided that the Bolivian business of the company should be carried on and managed by a local board, the first members of which were thereby appointed and empowered to act on and from April 1,

1917. The said F. A. Aramayo was appointed one of the members and also the manager of the local board. It was agreed for the purposes of this case that the amended articles are in all material respects similar to the articles under which a local board was established by the Egyptian Hotels, Ld., in *Egyptian Hotels, Ld.* v. *Mitchell.* (1)

The following is a copy of a minute taken at a meeting of the directors of the company held on March 26, 1917 :—

" The following letter dated March 26 from Messrs. Avelino Aramayo & Co."—the London firm—" was submitted :—

" ' In view of the resolutions which were passed at an extraordinary general meeting vesting the management of the company's Bolivian business in a local board, we think it right to say that in the interests of the company we are prepared to cancel our agreement with you dated December 17, 1906, and indorsement thereon dated July 6, 1916, and accordingly you are at liberty to treat this letter as an offer to that effect. Yours faithfully, p.p. Avelino Aramayo & Co. L. A. Kensington.'

" Resolved that the offer contained in the said letter be and is hereby accepted to the intent that from henceforth the mutual rights and obligations under the said agreement be cancelled and extinguished."

By a letter dated March 31, 1917, from Biarritz in France where he was residing the said F. A. Aramayo, as manager of the local board, instructed the London firm to sell as brokers on commission all material consigned to them. The letter was in these terms : " As manager of the local board of Aramayo Francke Mines, Ld., Bolivia, I beg to instruct you from now onwards to sell as brokers on commission all the material which may be consigned to you from time to time including that which you now have in hand belonging to my company, your commissions to be those which have previously ruled for the various classes of ores and materials."

During the year from April 6, 1917, to April 5, 1918,

(1) (1915) 6 Tax Cas. 542 ; see *Mitchell* v. *Egyptian Hotels, Ld.* [1915] A. C. 1022, 1027–1029.

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO.
AVELINO ARAMAYO & CO. v. OGSTON.
ECCOTT v. ARAMAYO FRANCKE MINES, LD.

the business of the company was carried on under the arrangements above set out, except that there was no substantial alteration in the duties performed and the powers exercised by the London firm.

On April 4, 1917, the company sent notice in writing to the Commissioners for taxes under s. 131 of the Income Tax Act, 1842, demanding to be assessed to income tax under Sch. D by the Commissioners for Special Purposes of the Income Tax Acts. The notice was sent by the solicitors for the company and was in the following form :—

"In anticipation of the usual form of return which our clients will be called upon to make under Sch. D of the Income Tax Act, 1842, we do on their behalf pursuant to s. 131 of the said Act require that all proceedings in order to an assessment upon the said company in respect of profits or gains chargeable under the said Schedule in respect of the year commencing April 6, 1917, shall be had and taken before the Commissioners for special purposes instead of the additional Commissioners or the Commissioners for general purposes and we hereby declare that the said company did on March 26, 1917, confirm the Resolutions a copy whereof is enclosed herewith (1) and that it is proposed by the said company that during the year of assessment commencing on April 6, 1917, or so soon after the said April 6, 1917, as conveniently may be the trade of producing minerals from the company's mines in Bolivia shall be managed, exercised, and carried on by the local board established pursuant to the said resolutions and shall not be managed, exercised, or carried on by the board of directors or from the offices of the company in the United Kingdom and the profits derived from the production of minerals from the company's mines shall be retained in Bolivia and used for the purpose of paying the expense of carrying on the company's trade there and such dividends as are payable to shareholders not resident in the United Kingdom, and shall be remitted to the United Kingdom only to such amount as may be necessary to pay dividends to shareholders resident in the

(1) These are the resolutions adopting the Articles referred to above as similar to those set out in [1915] A. C. 1027–1029.

United Kingdom and the expenses incurred by the board of directors in London."

On May 19, 1917, the secretary of the company in making a return for assessment under Sch. D expressed the company's election that the assessment should be made by the special Commissioners. By the same return the company claimed that they were not chargeable for the year ending April 5, 1918, on the ground that: "The company on March 26, 1917, confirmed the resolutions, a copy of which is enclosed herewith, and from April 5, 1917, the trade of producing minerals from the company's mines in Bolivia has been and is being managed, exercised, and carried on by the local board established pursuant to the said resolutions and has not been and will not be managed, exercised, or carried on by the board of directors or from the offices of the company in the United Kingdom and the profits derived from the production of minerals from the company's mines is being retained and used for the purpose of paying the expenses of carrying on the company's trade there and such dividends as are payable to shareholders not resident in the United Kingdom, and will be remitted to the United Kingdom only to such amount as may be necessary to pay dividends to shareholders resident in the United Kingdom and the expenses incurred by the board of directors in London. The company will in due course account to the Surveyor for the income tax deducted from those dividends which are entrusted to them for payment."

On January 4, 1918, the special Commissioners, instead of assessing the company, addressed the following notice of assessment:—"Assessment No. 11.

"To the local board of Aramayo Francke Mines, Ld., Bolivia, in the name of Avelino Aramayo & Co. Agents.

"Take notice that the Commissioners for the Special Purposes of the Income Tax Acts have by virtue of the power and authority vested in them by the said Acts made an assessment" [without stating on whom] "as follows for the year ending April 5, 1918; viz., on profits 99,733*l.* Net amount of assessment 99,733*l.* at 5*s.* in the £. Duty 24,933*l.* 5*s.* Net duty payable 24,933*l.* 5*s.*"

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO.

AVELINO ARAMAYO & CO. v. OGSTON.

ECCOTT v. ARAMAYO FRANCKE MINES, LD.

On January 22, 1918, the following notice of appeal was sent to the Surveyor of Taxes and to the special Commissioners :—

"Take notice that it is our intention to appeal against an assessment No. 11 . . . . purporting to be made against the local board of Aramayo Francke Mines, Ld., in the name of Avelino Aramayo & Co. under Schedule D for the year ending April 5, 1918, on the sum of 99,733*l.* in an amount of 24,933*l.* 5*s.* on the following grounds :—

"1. Messrs. Avelino Aramayo & Co."—the London firm—"submit by way of protest against the jurisdiction of the special Commissioners that there is no power or jurisdiction under the Income Tax Acts to make an assessment against them in respect of any trade carried on by the Aramayo Francke Mines, Ld., Bolivia, or against Aramayo Francke Mines, Ld., Bolivia, in their name, and they give this notice and will appear at the hearing of the appeal subject to this protest.

"2. Messrs. Avelino Aramayo & Co."—the London firm—"are not factors, agents, receivers, or managers for the local board of Aramayo Francke Mines, Ld., Bolivia, nor do they carry on nor are they a branch thereof nor have they the receipt of any profits or gains thereof.

"3. Messrs. Avelino Aramayo & Co. are general commission agents within the meaning of s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915, and have no authority to carry on any regular agency for the local board of Aramayo Francke Mines, Ld., Bolivia.

"4. The trade carried on by the local board of Aramayo Francke Mines, Ld., Bolivia, is carried on in the Republic of Bolivia in South America and wholly outside the United Kingdom and is not managed, directed, or controlled within the United Kingdom and is not assessable to nor chargeable with income tax.

"Dated this 22nd day of January, 1918," etc. This was signed by Messrs. Dale & Co., "solicitors for the appellants."

The appeal was heard on November 15, 1918. The Commissioners affirmed the assessment on the ground "that

the appellant firm "—the London firm—" must be regarded as authorized to carry on the regular agency of the local board." The London firm demanded a special case, and the special case of *Avelino Aramayo & Co.* v. *Ogston* was stated as appears below. But before the case was stated—namely, on December 5, 1919—a writ was issued, and on February 11, 1920, an information was by the Attorney-General filed against F. A. Aramayo and Elvira Charpentier trading as Avelino Aramayo & Co., the London firm, claiming 24,933*l.* 5*s.* for income tax under Sch. D, alleged to be payable by the firm and to have been duly assessed upon them by the above assessment. On February 28, 1920, the defendants delivered their plea, alleging that the assessment was made contrary to the provisions of the Income Tax Acts and without jurisdiction and denied that they were indebted in the sum mentioned or any part thereof.

On March 4, 1921, before the information was heard and before the special case was stated, the special Commissioners served notice of assessment upon the liquidator of the company, which was being voluntarily wound up, for the year ending on April 5, 1918, in respect of the same profits as were the subject of the assessment already made on January 4 on the London firm.

On April 8, 1921, the special case above referred to was stated. It was intituled *Avelino Aramayo & Co.*, appellants v. *Ogston*, Surveyor of Taxes, respondent. It set out at great length the course of business between the company and the London firm and proceeded as follows :—

" 18. In these circumstances counsel on behalf of the appellant firm, while not objecting to the jurisdiction of the special Commissioners, or to the form in which the assessment was made, contended :—

(1.) That the appellant firm were not assessable as agents for Aramayo Francke Mines, Ld. ;

(2.) That the company was not assessable as a company having the seat of control of its trade in the United Kingdom ;

(3.) That neither the local board nor the company were

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO.
AVELINO ARAMAYO & CO. v. OGSTON.
ECCOTT v. ARAMAYO FRANCKE MINES, LD.

trading in the United Kingdom, but that the trade was carried on in Bolivia at the mines;

(4.) That the appellant firm were brokers or general commission agents and exempt from income tax by s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915.

"19. Counsel on behalf of the Surveyor of Taxes contended that the local board were trading in the United Kingdom and that the relief given by the sub-section referred to did not apply in the present case.

"20. We, the Commissioners who heard the appeal, having considered the arguments submitted to us, decided that the appellant firm must be regarded as authorized to carry on the regular agency of the local board, and we confirmed the assessment appealed against. The appellant firm immediately upon the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a case for the opinion of the High Court pursuant to s. 59 of the Taxes Management Act, 1880, which case we have stated and do sign accordingly. The only questions for the opinion of the Court are:—

(1.) Whether there was any carrying on of the trade in question in the United Kingdom;

(2.) Whether the appellant firm were exempt from income tax by reason of s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915."

The company then appealed from the assessment made upon them by the special Commissioners on March 4, 1921. The appeal was heard on July 30, 1921. The Commissioners discharged the assessment. The Inspector of Taxes demanded a special case, and on January 2, 1922, a second special case intituled *Eccott*, Inspector of Taxes, appellant v. *Aramayo Francke Mines, Ld.* (in liquidation), respondents, was stated. The facts and circumstances set forth in *Ogston's* case were to be taken as the facts and circumstances of this case. In para. 6 of the case the Commissioners stated their reasons for discharging the assessment as follows: "We, the Commissioners who heard the appeal, although of the same opinion

as our colleagues that a trade was being carried on in the United Kingdom by the duly authorized agent of the local board of the appellant company, decided to discharge the present assessment on the ground that there was no reason for assuming that the previous assessment was not a valid one and sufficient to tax the profits charged by the present assessment."

The information and the two special cases were heard together before Rowlatt J. The learned judge gave judgment for the Crown on the information. In *Ogston's* case he quashed the assessment and allowed the appeal on the ground that the local board in Bolivia, being non-resident agents, could not be assessed. In *Eccott's* case he upheld the assessment and allowed the appeal.

The London firm appealed from the judgment on the information. The Surveyor of Taxes appealed in *Ogston's* case. The company appealed in *Eccott's* case.

Edwardes Jones and *Hildesley* for appellants on the information, the respondents in *Ogston's* case, and the appellants in *Eccott's* case. First, the judgment on the information cannot stand. It is based on the assessment in *Ogston's* case, which assessment was ultra vires and void, having been made by the Commissioners for Special Purposes upon the London firm as agents for the local board in Bolivia. The special Commissioners have no jurisdiction to assess any one except upon a previous demand made by the person whom they assess. No demand was made by the London firm or the local board or any one on their behalf. A demand was made by the company, and upon that demand the special Commissioners have purported to assess the local board of the company in the name of its London agents. This assessment is plainly ultra vires and void. Judgment ought therefore to be entered for the appellants on the information.

It follows that the decision of the learned judge in *Ogston's* case was right and should be affirmed.

In *Eccott's* case there has been no finding upon the questions submitted to the Court—namely: (1.) Whether there was any

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO. AVELINO ARAMAYO & CO. v. OGSTON. ECCOTT v. ARAMAYO FRANCKE MINES, LD.

carrying on of the company's trade in this country; and (2.) whether the London firm were anything more than general commission agents or brokers within s. 31 of the Finance (No. 2) Act, 1915. It is true that the Commissioners who heard *Eccott's* case in effect state as the opinion of their colleagues in *Ogston's* case "that a trade was being carried on in the United Kingdom by the duly authorized agent of the local board" of the company; but in the first place the proceedings in *Ogston's* case are null and void, and in the second place the Commissioners in that case did not find as a fact that a trade was being carried on in the United Kingdom by an authorized agent. They stated the facts for the opinion of the Court, and there has been no finding upon this question except the opinion of the Commissioners in *Eccott's* case, which was unnecessary for the decision of that case. *Eccott's* case should therefore be remitted to the Commissioners for a direct finding upon these questions.

Sir Patrick Hastings A.-G., Sir Thomas Inskip K.C. and *R. P. Hills* for the Crown. The company are assessable to income tax under Sch. D, Case I., as a company residing in England and carrying on their business in England through the London firm, their regular agents. This is the result of the findings of the special Commissioners in the *Ogston* and *Eccott* cases.

In *Ogston's* case the London firm are estopped from saying that the special Commissioners had no jurisdiction to make the assessment. They did not object to the jurisdiction or to the form in which the assessment was made, but appealed and required the Commissioners to state a case merely upon the questions: (1.) Whether any trade was being carried on in England and (2.) Whether the London firm were regular agents or only general commission agents. This is not a case where the Commissioners have no jurisdiction at all, so that neither the conduct of the parties nor their agreement could confer jurisdiction. The demand of the company to be assessed by the special Commissioners clothed those Commissioners with jurisdiction, if it is properly exercised. If it is irregularly exercised the irregularity may be waived, and has been

waived in the present case: *Andrewes* v. *Elliott* (1); *Broad* v. *Perkins*. (2) Upon the question whether an assessment could in any case be made upon foreign agents of an English company in the name of an agent, this point has no merits; the company, the local board, and the London firm are in substance and in truth all one and the same.

In any case the decision of the learned judge in the *Eccott* case should be affirmed. In this case the assessment was perfectly regular, having been made on the company in the name of the London firm, their regular agents, and on the demand of the company to be assessed by the special Commissioners. The Commissioners discharged this assessment on the ground that the assessment in *Ogston's* case was valid. If that assessment is held to be invalid the assessment in *Eccott's* case should stand; and if it stands the Crown does not press the appeal in *Ogston's* case.

With regard to the information, the Crown was within its rights under s. 59, sub-s. 4, of the Taxes Management Act, 1880 (3), in filing the information, although an appeal was pending against the assessment in *Ogston's* case. That assessment stood undischarged at the time when the information was filed, and the London firm ought to have paid the tax assessed upon them. This appeal therefore should be dismissed.

Edwardes Jones in reply. The London firm could not by

(1) (1856) 6 E. & B. 338.

(2) (1888) 21 Q. B. D. 533.

(3) Sect. 59, sub-s. 1, of the Taxes Management Act, 1880, provides that immediately upon the determination of any appeal by the general or special Commissioners the appellant may declare his dissatisfaction and within the time specified require the Commissioners to state a case for the opinion of the High Court.

By sub-s. 4: "The fact that a case so stated is pending before the High Court . . . . shall not in any way interfere with the payment of the income tax . . . . according to the assessment of the Commissioners by whom the case was stated, but the income tax . . . . shall be paid according to such assessment, as if the case had not been required to be stated, and in the event of the amount of assessment being altered by the order or judgment of the High Court the difference in amount, if too much has been paid, shall be repaid with such interest (if any) as the High Court may allow, and if too little, shall be deemed to be arrears . . . . and shall be paid and recovered accordingly."

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO. AVELINO ARAMAYO & CO. v. OGSTON. ECCOTT v. ARAMAYO FRANCKE MINES, LD.

their conduct or by agreement confer upon the special Commissioners a jurisdiction which is not theirs by law: *Farquharson* v. *Morgan* (1); *Norwich Corporation* v. *Norwich Electric Tramways Co.* (2) But even if jurisdiction could be conferred by waiver or estoppel, an assessment charging the agent of a foreign agent is clearly wrong. Therefore the assessment in *Ogston's* case fails and the appeal in that case should be dismissed. The assessment in *Ogston's* case is the foundation of the judgment for the Crown on the information. The appeal from that judgment should therefore be allowed. It is also the foundation of the assessment in *Eccott's* case, which must fall with it, and the appeal in *Eccott's* case should be allowed and the case sent back to the special Commissioners.

Cur. adv. vult.

1924. June 5. Written judgments were delivered by Bankes and Scrutton L.JJ. as follows:—

BANKES L.J. These three appeals all relate to the question of what income tax was payable by the Aramayo Francke Mines, Ld. (hereinafter called "the limited company"), for the year ending April 5, 1918. Of one thing I am quite certain—namely, that all parties in this dispute have at one time or another been entirely in the wrong. I wish that I could see my way as clearly in reference to what is the right course for this Court to take under all the circumstances.

The limited company was registered in this country many years ago. Its main business consisted in working mines in Bolivia and in marketing the produce of the mines by its agents in this country. The *Egyptian Hotels* case (3) was decided by the House of Lords in July, 1915. As a result of that decision it occurred to the advisers of the limited company that they might so rearrange matters as to bring the company within the protection of that decision, and so escape the payment of income tax under Sch. D, Case 1, and be liable to be assessed (if at all) under Case 5 only. In order to secure

(1) [1894] 1 Q. B. 552. (2) [1906] 2 K. B. 119.
(3) [1915] A. C. 1022.

this result, the proposal was to establish a local board in Bolivia, which should carry on the Bolivian business to the exclusion of the board of directors in England, and that the limited company's former agents, Messrs. Avelino Aramayo & Co. (hereinafter called "the firm"), should act as commission agents merely in disposing of the produce of the mines, and so bring themselves and the limited company within the scope of s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915. Special resolutions were passed and confirmed in March, 1917, making the necessary alterations in the articles of association.

At once troubles began. On April 4, 1917, the solicitors on behalf of the limited company, in anticipation that their clients would be called upon under Sch. D of the Act of 1842 to make the usual form of return, demanded that all proceedings in order to an assessment upon the limited company should be had and taken before the Commissioners for Special Purposes. Notice to this effect was given under s. 131 of the Act of 1842, which gives any person chargeable to the duties contained in Sch. D a right to make the demand. Counsel for the limited company and for the firm contends that this notice could only be given, and was only given, by the limited company, as they were the only persons chargeable under the statute, and they, according to their contention, were only chargeable under Case 5. As a result of this requisition, the secretary on May 19, 1917, made a nil return, explaining why he did so in an accompanying letter. This, in my opinion, upon the facts, was quite wrong. However, the Commissioners were apparently determined to go one better on the wrong path; so on January 4, 1918, they caused notice to be given directed to "The Local Board of Aramayo Francke Mines, Ld., Bolivia, in the name of Avelino Aramayo & Co.," stating that the Commissioners had made an assessment, without stating on whom, for the year ending April 5, 1918, of 99,733*l.*, and that the duty payable was 24,933*l.* 5*s.*

I pause here for a moment to see what the special Commissioners had done. In reply to a demand by a party chargeable to be assessed by them they had apparently assessed, not the party chargeable, but the English agent of

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO.

AVELINO ARAMAYO & CO. v. OGSTON.

ECCOTT v. ARAMAYO FRANCKE MINES, LD.

Bankes L.J.

the foreign agent of the principal who was the only party claiming to be chargeable. It was strenuously argued before us that the special Commissioners had no jurisdiction to make any such assessment, and if the point had been taken at a proper time and in a proper way, it ought, in my opinion, to have succeeded. It was however apparently not desired at that stage of the litigation to have that question decided. What the limited company was anxious to have decided was whether the trading since the altered conditions was a trading wholly or partly in England or was only a trading with England. In response therefore to the invitation to appeal the firm appealed, which they were only justified in doing if they adopted the limited company's notice, which alone clothed the special Commissioners with any jurisdiction to hear and determine the matter. The appeal was heard, and the special Commissioners decided against the appellants, who thereupon demanded a special case, thereby again adopting the notice given by the limited company. A case was stated in which the Commissioners set out all the relevant facts in reference to the carrying on of the limited company's trade during the year in question, but they did not in express terms decide the question of fact, whether there was any carrying on of trade in the United Kingdom, but left that as a question to be decided by the Court. The second question left to the Court was whether the firm was exempt from income tax by reason of s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915. What the Commissioners did decide was that the firm must be regarded as authorized to carry on the regular agency of the local board. This would be an immaterial finding unless they also considered that the trade of the local board was being carried on in this country. This case was stated on April 8, 1921. The appeal had been heard on November 15, 1918, and the Crown had commenced proceedings by way of information on December 5, 1919. Had this information been brought to trial at any time before the hearing of the special case, the Crown would have been entitled to judgment, unless the firm could have made good their point that the special Commissioners had no jurisdiction at all to assess them.

This is the effect of the provision in s. 59, sub-s. 4, of the Taxes Management Act, 1880. In my opinion, the firm could not have established, and cannot now establish, this plea of want of jurisdiction. This case is, in my opinion, essentially different from a case in which a tribunal has under no circumstances jurisdiction to entertain a matter. I do not think that the cases cited by Mr. Edwardes Jones govern this case. Under s. 131 of the Act of 1842 the special Commissioners have jurisdiction in every case where it is invoked by a party chargeable. It is quite true that the limited company invoked the exercise of the jurisdiction, and as a result of that invocation the special Commissioners assessed the firm. If the firm, instead of taking the appropriate action to challenge the jurisdiction of the special Commissioners, elect to appeal to them, and then require them to state a special case, they cannot, in my opinion, be heard to say that they did not either adopt the notice given by the limited company or waive the absence of a sufficient notice. The case appears to me to be analogous to the common case where a foreigner who is not amenable to the jurisdiction of the Courts of this country is not allowed to object to the jurisdiction if he has voluntarily submitted to the jurisdiction by appearance without protest.

In the events which happened, and by arrangement between all parties, the information and the special case (the *Ogston* case) came on together. Under these circumstances it is no doubt open to a learned judge to exercise a discretion as to the proper course to take upon information proceedings, if he is of opinion upon the special case that the assessment which is sought to be enforced ought never to have been made. The proceedings in the present case were complicated by the fact that on March 4, 1921, whilst the firm's appeal and the information were pending, the special Commissioners made an assessment upon the limited company in respect of the same profits as had already been assessed by the assessment on the firm. In this case an appeal followed the assessment, and a special case followed the appeal. This special case (the *Eccott* case) was also before the learned judge at the same

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO. AVELINO ARAMAYO & CO. v. OGSTON. ECCOTT v. ARAMAYO FRANCKE MINES, LD.

Bankes L.J.

time as the *Ogston* case and the information, again by an arrangement between all parties. The *Eccott* case does not submit any question for the Court. The Commissioners' decision is set out in para. 6, which is as follows: "We, the Commissioners who heard the appeal, although of the same opinion as our colleagues, that a trade was being carried on in the United Kingdom by the duly authorized agent of the local board of the appellant company, decided to discharge the present assessment on the ground that there was no reason for assuming that the previous assessment was not a valid one and sufficient to tax the profits charged by the present assessment." One of the Commissioners who joined in this statement was also one of those who heard the firm's appeal, and this finding confirms my view already expressed, that the Commissioners in the *Ogston* case must have intended their finding to include a finding that the limited company by its agents were carrying on business in this country. This was the real question which the limited company were raising. As the parties desired both cases to come on together, I think that the learned judge was justified upon the materials contained in the two special cases in treating the findings on this material question as findings against the contention of the limited company. There was, in my opinion, undoubtedly evidence before the Commissioners and before the learned judge which justified this finding. What the limited company asked the learned judge to do was to dismiss the information on the ground of want of jurisdiction. This he refused to do, and I think rightly. The limited company also asked the judge to reverse the decision in the *Ogston* case. The Crown asked the learned judge to reverse the decision in the *Eccott* case, while the limited company asked the learned judge to remit this case to the Commissioners for rehearing. The learned judge determined, if possible, to put an end to the dispute himself, and what he did was to enter judgment against the firm on the information for the full amount of the duties claimed with costs. He held that the decision of the Commissioners on the *Ogston* case was erroneous and allowed the appeal with costs. He made a similar order on the

Eccott case. With respect to the learned judge, I think that he has gone too far in his desire to take a short cut. He has in terms said in his judgment that the assessment upon the firm was wrong, and yet he has entered judgment on the information against the firm. One may guess that the relations between the firm and the limited company are such that it really makes no matter whether a judgment is entered up against the firm or against the limited company, but I do not think that the Court can act upon any such assumption. If the assessment upon the firm was wrong, as I think it was, and Rowlatt J. has held it was, then I consider that the result should be that no judgment should be entered for the Crown upon the information. In saying this I do not in the least desire to encroach upon the rights of the Crown as conferred by s. 59, sub-s. 4, of the Taxes Management Act, 1880, but I think that if the Crown delay the hearing of an information until the hearing of a special case in which the question whether the parties proceeded against were properly assessed or not is to be decided, no complaint can be made if the Court feels compelled to act logically and to refuse to enter a judgment against a party whom it holds, in a proceeding heard simultaneously with the information, not to be liable. In my opinion, the right course to take is to decide in favour of the Crown upon the *Eccott* case and to declare that upon the facts stated in that case and in the *Ogston* case the limited company were properly assessed by the special Commissioners in the sum of 99,733*l.* for the year ending April 5, 1918, and to dismiss the appeal on that case with costs in this Court and below, and of the special case.

The appeal against the judgment on the information succeeds, and the judgment must be set aside, and the information dismissed, but without costs, except the costs of the appeal, which the appellants must have.

The appeal in the *Ogston* case is dismissed with costs.

SCRUTTON L.J. The question whether English income tax should be paid directly or indirectly by an English company named Aramayo Francke Mines, Ld., in respect of the year

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO. AVELINO ARAMAYO & CO. v. OGSTON. ECCOTT v. ARAMAYO FRANCKE MINES, LD.

Scrutton L.J.

of assessment, April, 1917–April, 1918, has after over six years of correspondence and litigation got into a state of great confusion. There are two special cases assessing two different persons for the same profits. The judge below has allowed one assessment and quashed the other. Each side appeals against his decision. One side suggests that both cases should be sent back to the Commissioners. The Crown seeks to uphold a judgment in an information demanding payment of a sum under an assessment which the judge who gave the judgment has quashed. There are a good many irregularities on both sides, and if strict technical forms are observed another six years may easily be taken before the 1917–1918 assessment is disposed of and the parties proceed to litigate about the assessments for subsequent years. Under these circumstances, Rowlatt J. has endeavoured to decide the questions really in dispute without undue regard to technicalities, and I propose to do the same.

The real question is whether Aramayo Francke Mines, Ld., whom I will call the English company, carry on part of their trade in England. If they do not, as the governing body of their trade is in Bolivia in the form of a Bolivian local board, they are entitled to have their assessment limited to the profits they receive in England, if any, as from foreign possessions under Case 5. If they do carry on part of their trade in England, though under the direction of the Bolivian local board, they are in the position of an English resident receiving profits from a trade partly carried on in England, and are to be assessed under Case 1. This is the result of the *Egyptian Hotels* case (1), as explained by Lord Parker. In *Ogston's* case the special Commissioners have asked the question: "Whether there was any carrying on of the trade in question in the United Kingdom?" They have not in terms stated their own finding on the point, but I think they must be taken to have found it was. In *Eccott's* case (one of the special Commissioners in this case being one of the two who heard *Ogston's* case), two Commissioners use the words, "although of the same opinion as our colleagues that a

(1) [1915] A. C. 1022, 1036, 1037.

trade was being carried on in the United Kingdom." In the first case a number of relevant facts are stated; in the second they are taken as repeated. It seems to me clear from those facts that the minerals produced by the company's mines are in fact sold and delivered in England under contracts made in England, where the price is received, on behalf of the English company, though under the orders of the Bolivian local board. It is the same as if all the products of a manufacture abroad, owned by an English company, but controlled by a local board abroad, were in fact sold in a shop in England belonging to the English company, but controlled by the same local board. I agree that the position is very similar to that which would arise if in *Mitchell* v. *Egyptian Hotels, Ld.* (1), the company opened an hotel in England; but it is a stronger position, for here all the products of the company's mines are sold in England. The substantial position which the English company set themselves to defend—namely, that they are only liable to be taxed under Case 5 on those profits of their trade carried on and controlled abroad, which are received in England—they fail to hold; and they should, as an English company resident here and carrying on through agents part of their trade in England, be liable under Case 1 of Sch. D. So much for the merits.

The technicalities are very confusing. When the English company altered their constitution in view of the *Egyptian Hotels* case (1) to avoid English income tax, they desired a speedy decision of the question whether their alterations had been successful. Accordingly their solicitors required, under s. 131 of the Act of 1842, that their assessment should be made by the special Commissioners. Some ingenious person, on behalf of the Inland Revenue, conceived the idea that the effect of the *Egyptian Hotels* case (1) might be nullified by treating the Bolivian local board, who now controlled the trade of the company, as a separate non-resident person carrying on a trade in England through their agents, Avelino Aramayo & Co., who had been the English agents of the company, and assessing the Bolivian local board in the

(1) [1915] A. C. 1022.

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO. AVELINO ARAMAYO & CO. v. OGSTON. ECCOTT v. ARAMAYO FRANCKE MINES, LD.

Scrutton L.J.

name of the English agents under s. 41 of the Act of 1842. This was not at all what the English company expected; and they urged that business was not being carried on in England, because the control was abroad, and that the English agents were only commission agents, and exempt under s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915. These points the Commissioners appear to have decided against them, noting that the "appellant firm," meaning the agents, "did not object to the jurisdiction of the special Commissioners, or to the form in which the assessment was made." There was however a much stronger ground of attack on the assessment. In my view, it was quite wrong to assess the profits of an English company by assessing its foreign controlling agent in the name of an English agent; the profits are not the profits of the foreign controlling agent, but of its English principal. And if the foreign controlling agent were to be assessed as a separate person, neither that person nor the English agent had ever required the special Commissioners to assess him or them. But, as counsel for the company frankly said, this line of attack never occurred to them till some years afterwards, and the proceedings went on on the assumption that the English company, the local board, and the English agent were all the same person. The appellants' solicitor continually described the proceedings in the name of the English company. The first head of the notice of appeal against assessment describes it as an assessment on the English company in the name of the agents. I have considered the course of the proceedings, and have come to the conclusion that the appellants are precluded by their conduct from raising the point that, as they had not required the special Commissioners to make the assessment, it was therefore invalid.

The point as to the persons assessed stands in rather a curious position. Rowlatt J. has quashed the assessment on the ground that it was wrong that the Bolivian local board, a non-resident agent of the company, should be assessed. This point is not expressly raised by the special case, though it stares one in the face. But on the one hand the Crown's appeal against the judge's decision is not pressed, if they

win on the second case, as I think they should; and, on the other hand, if the English company fail on the plea of no jurisdiction, it does not help them to have the assessment supported; they do not want that. Holding the view I do on the merits, I think the simplest thing is to leave alone the decision of Rowlatt J. quashing the first assessment, which assessment was indeed practically admitted by the Crown to be unsupportable, if the proper objections were taken to it.

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & Co.

AVELINO ARAMAYO & Co. v. OGSTON.

ECCOTT v. ARAMAYO FRANCKE MINES, LD.

Scrutton L.J.

Then came the second assessment, which was made much later, though within the three years' limit. This was on the company as an English resident carrying on part of its trade in England. We are bound to hold it an English resident, though its trade is controlled abroad, by the decision of this Court in the *Swedish Central Ry. Co.* v. *Thompson.* (1) In view of my decision on the merits, I think it is also clear that it was carrying on part of its trade in England. The special Commissioners quashed the assessment because they thought there was already a valid assessment, valid, I gather, in the sense that the proper objections were not, and could not be, taken to it, and that "there was no reason for assuming that the previous assessment was not a valid assessment." But in this Court the position is that the previous assessment has been quashed, and there is no effective appeal against its quashing; the Commissioners' reason for quashing the second assessment therefore disappears; their implied finding in the first assessment that there is a trade carried on in England supports the second assessment; and the point about commission agents does not arise in an assessment on a company resident in England. In my view, therefore, the second assessment should stand.

There remains the question as to the information. I quite appreciate the view of the Crown that the assessed tax should be paid though there is an appeal; and it is important that this should be enforced promptly. But when, after great delay, the information and the appeal against the assessment on which the information is based come on for trial practically

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO.
AVELINO ARAMAYO & CO. v. OGSTON.
ECCOTT v. ARAMAYO FRANCKE MINES, LD.

Scrutton L.J.

simultaneously, and the assessment is quashed, it appears to me farcical to give judgment that the sum shall be paid when it must immediately be repaid, because the assessment on which it is based has been quashed. If the Crown want to enforce payment while an appeal is pending, as they have a right to do, they should do so promptly. I think that the information should be dismissed, but that as the substantial appellants, the company, should have paid or provided the money before, it should be dismissed without costs below, the appellants having the costs of the appeal only. The appeal of the Crown against the quashing of the first assessment should be dismissed with costs, and the appeal of the company against the affirming of the second assessment should share the same fate.

ATKIN L.J. I agree, and inasmuch as I do not differ in any way from what has been said by the Lords Justices I have not thought it necessary to write a separate judgment; but I should like merely to summarize the points that have arisen in deference to the argument that was addressed to us by Mr. Edwardes Jones.

In respect of the assessment in the *Ogston* case, it appears to me that it is not open to the firm to take the point that the assessment was made without jurisdiction. They appealed to the special Commissioners from the assessment and then required them to state a case upon their determination in point of law. Having so invoked the jurisdiction of the Commissioners, they cannot afterwards be heard to say that there was no jurisdiction at all. It is a case where the Commissioners had jurisdiction subject to certain formalities being complied with, and in those circumstances it is possible that there can be, and in this case there was, a waiver in respect of that point. Nevertheless upon the facts found by the special Commissioners in the case it is apparent that their decision was wrong in point of law, and that is all that is necessary to enable this Court to give effect to the point of law. As I read the statutory procedure, which at that time depended on s. 59 of the Taxes Management Act, 1880, the

Court is not limited to particular questions raised by the Commissioners in the form of questions on the case. All that the section provides is that if the appellant is dissatisfied with the determination as being erroneous in point of law he may require the Commissioners to state and sign a case, and the case shall set forth the facts and the determination, and upon that being done the Court has to decide whether or not the determination was or was not erroneous in point of law, and any point of law that can be raised properly upon the facts found by the Commissioners the Court can decide. No doubt there may be a point of law in respect of which the facts have not been sufficiently found, and if that point of law was not raised below at all and cannot be raised without further facts on either side, the Court may very well refuse to give effect to it, and either party may have precluded themselves by their conduct from raising in the Court of Appeal the point of law which they deliberately refrained from raising down below. Those questions, of course, have to be considered. But apart from that, if the point of law or the erroneous nature of the determination of the point of law is apparent upon the case as stated, and there are no further facts to be found, the Court can give effect to the law. In this case it seems to me plain, for the reasons stated by my learned brethren, that an assessment on a local board which is controlling abroad a business in this country is wholly and entirely wrong. There is no kind of foundation for it in any Act of Parliament or in any case. We must give effect to that view and hold that this assessment should be quashed, and inasmuch as the learned judge did quash it on that ground, I think the appeal of the Crown on that assessment in those circumstances should be dismissed.

On the *Eccott* case a further question arises. The Commissioners decided on a different point—namely, that the *Ogston* assessment was sufficient and valid. In that they made a mistake. They have found facts by reference to the *Ogston* case which indicate clearly that the limited company, who were the party assessed in that case, were resident in this country and were in part at any rate exercising

C. A. 1924

ATTORNEY-GENERAL v. AVELINO ARAMAYO & CO. AVELINO ARAMAYO & CO. v. OGSTON. ECCOTT v. ARAMAYO FRANCKE MINES, LD.

Atkin L.J.

within this country the trade in respect of which profits accrued to them. Consequently they were assessable to income tax, and therefore that assessment should stand. The learned judge took that view. I think he was right and that the appeal of the company in that case should be dismissed.

The other question is the question of the information. Now when the information was filed it was based upon an assessment which at that time stood, and in respect of which therefore the defendants ought to have paid. But when the foundation is discovered to have been bad at the time when the learned judge is dealing with the information, the foundation of the information having gone, the information itself must necessarily be dismissed. For the reasons that I have stated and for the reasons given by my learned brethren, in these circumstances the appeal by the defendants in that case should be allowed with costs. I also think, inasmuch as it was the duty of the then defendants to pay, that the information should be dismissed without costs in the Court below.

There is only one other point that I want to mention, and that is in respect of s. 131. I do not propose to decide it, but it seems to me to be at least doubtful whether it is open to a person to invoke the jurisdiction of the special Commissioners as a person chargeable with a view to being assessed by them merely for the purpose, when he is assessed by the special Commissioners, of saying that he ought not to be assessed by the special Commissioners or any one else. I am inclined to think that the invocation of the jurisdiction of the special Commissioners in those circumstances is an admission at any rate that the person so invoking their jurisdiction admits he is assessable for profits; but that is a matter which need not be dealt with at the present moment in view of the other circumstances of the case.

ATTORNEY-GENERAL *v.* AVELINO ARAMAYO AND COMPANY.

Appeal allowed with costs. Information dismissed without costs.

AVELINO ARAMAYO AND COMPANY *v.* OGSTON.

Appeal dismissed.

ECCOTT *v.* ARAMAYO FRANCKE MINES, LIMITED.

Appeal dismissed.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for Avelino Aramayo & Co. and Aramayo Francke Mines, Ld.: *Dale & Co.*

W. H. G.

C. A. 1924

ATTORNEY-GENERAL *v.* AVELINO ARAMAYO & CO.

AVELINO ARAMAYO & CO. *v.* OGSTON.

ECCOTT *v.* ARAMAYO FRANCKE MINES, LD.

PARRY *v.* HARDING.

1924 *Oct.* 17.

Landlord and Tenant—Restrictions—Housing—Local Authority acting in Execution of Powers under Improvement Scheme—Dwelling-house required for Purposes of Scheme—Alternative Accommodation—Housing, Town Planning, &c., Act, 1919 (9 & 10 *Geo.* 5, *c.* 35), *s.* 35—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 1 (*e*)—*Housing, Town Planning, &c., Act*, 1923 (13 & 14 *Geo.* 5, *c.* 24), *s.* 16, *Sch. II.—Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

The Rent Restriction Acts impose no obligation upon a local authority which is seeking to recover possession of a dwelling-house coming within the scope of the Acts of showing that alternative accommodation is available for the tenant, where the premises are required for the purposes of an improvement scheme under the Housing, Town Planning, &c., Acts.

CASE stated by justices of Exeter.

A complaint was made by the appellant under the Small Tenements Recovery Act, 1838, s. 1, against the respondent that, being the tenant of a tenement known as 33A Paul Street, Exeter, which tenancy had been legally determined, she had refused to quit and deliver up possession thereof and still retained the same. The justices dismissed the complaint and declined to make an order upon the respondent to give up possession of the tenement.

The appellant, who is the Town Clerk of Exeter, stated that the City Council were seeking to obtain the premises

1924

PARRY v. HARDING.

acting in execution of powers under an improvement scheme made in 1910 under Part I. of the Housing of the Working Classes Act, 1890, and confirmed by the Local Government Board on April 13, 1911, which enabled the whole of the north side of Paul Street to be purchased by the Council and demolished as an unhealthy area. The premises consisted of a small cottage situate in a lately vacated veterinary yard let to the respondent by the Council in March, 1923, on a weekly tenancy of 6*s.* 6*d.*, the first rent having been collected on March 26, 1923, and the rent having been regularly paid up to the expiration of the notice to quit.

It was proved that a notice to quit signed by the appellant was served on the respondent on December 17, 1923, to leave on December 31, and that the statutory notice of application for ejectment was given on March 26, 1924, for April 4, 1924.

It was contended by the appellant that the Council, as the local authority, were entitled as of right to an order giving them possession of the tenement without providing alternative accommodation for the respondent by virtue of divers statutory provisions detailed by him as follows :—

(1.) By the Housing, Town Planning, &c., Act, 1919, s. 35, it was enacted "Nothing in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, or in the enactments amending that Act, shall be deemed to affect the provisions of s. 17 of the Housing, Town Planning, &c., Act, 1909" (dealing with closing orders made by a council), "or to prevent a local authority from obtaining possession of any house the possession of which is required by them for the purpose of exercising their powers under the Housing Acts or under any scheme made under those Acts."

(2.) Although by the Increase of Rent, &c., Act, 1920, s. 5, sub-s. 1, it was enacted "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless (*e*) the landlord is a local authority or a statutory undertaking and the dwelling-house is reasonably required for the purpose of the execution of the

statutory duties or powers of the authority or undertaking, and the Court is satisfied as aforesaid as respects alternative accommodation," yet the prohibition thereby created was removed by the Housing, Town Planning, &c., Act, 1923, s. 16, and Sch. II. amending s. 35 of the Housing, Town Planning, &c., Act, 1919, thus, "For the words '(War Restrictions) Act, 1915,' there shall be substituted the words 'Restrictions Act, 1920.'"

(3.) That this amendment by substituting the Act of 1920 for the Act of 1915 was unaffected by the Rent and Mortgage Interest Restrictions Act, 1923, by which s. 4 of that Act was substituted for s. 5 of the Act of 1920, inasmuch as by s. 20 that Act is to be construed as one with the principal Act (the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) and should be read antecedently to the Housing, Town Planning, &c., Act, 1923.

The respondent stated that she had applied to the Council for a two-roomed cottage in an adjacent street, but that they would not let her have it, and that she had herself made every effort to obtain other suitable rooms, but had failed.

The justices were of opinion that the appellant's contention as to the Housing, Town Planning, &c., Act, 1923, was repugnant to the restrictions on landlords as re-enacted by the Rent and Mortgage Interest Restrictions Act, 1923, which they were bound to recognize as continuing the emergency protection existing for the benefit of tenants and which restrained them from making an order for possession in the absence of any other accommodation being found by the Council. They came to the conclusion that their action must be governed by the Rent and Mortgage Interest Restrictions Act, 1923, in so far as it was therein made a condition precedent to the making of an order to dispossess a tenant that they should be satisfied as to suitable alternative accommodation. As the appellant disputed the application of such condition and refused to provide any alternative accommodation for the respondent, they declined to issue a warrant of ejectment.

1924

PARRY v. HARDING.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Montgomery K.C. and *Carrol Romer* for the appellant.

No counsel appeared for the respondent.

LORD HEWART C.J. This is a case stated by justices for the City of Exeter sitting as a Court of summary jurisdiction. The appellant is the Town Clerk of Exeter, and a complaint was made by him under s. 1 of the Small Tenements Recovery Act, 1838, against the respondent "that being a tenant of a tenement known as 33A Paul Street in the said city which tenancy had been legally determined she had refused to quit and deliver up possession thereof and still retained the same." The justices heard that complaint and declined to make an order upon the respondent to give up possession. [His Lordship stated the facts and continued:] It is deplorable that in dealing with such a matter as this, a Court, and still more a private individual, and most of all a private individual who lives in a small tenement, should have to make some sort of path through the labyrinth and jungle of these sections and schedules. One would have thought that this was a matter above all others which the Legislature would take pains to make abundantly clear. Threading my way as best I can through this labyrinth I have arrived at a certain conclusion. The matter appears to stand in this way. In 1915 an Act of Parliament was passed called the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. That statute, among other things, imposed certain fetters upon the recovery of possession of dwelling-houses of a certain kind. Four years later another Act of Parliament was passed called the Housing, Town Planning, &c., Act, 1919, and s. 35 of that Act was inserted to prevent the Increase of Rent and Mortgage Interest (War Restrictions) Act of 1915 from limiting the powers of local authorities in certain defined directions. Sect. 35 is as follows: "Nothing in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, or in the enactments amending that Act, shall be deemed to affect the provisions of s. 17 of the

Housing, Town Planning, &c., Act, 1909, or to prevent a local authority from obtaining possession of any house the possession of which is required by them for the purpose of exercising their powers under the Housing Acts or under any scheme made under those Acts." The effect therefore was that notwithstanding that a particular house was of such a kind as to come within the Increase of Rent and Mortgage Interest (War Restrictions) Act of 1915, if a local authority desired to obtain possession of it for some one of the particular and limited purposes mentioned in s. 35 of the Act of 1919 the local authority was not to be hindered. Then came the third stage, consisting of the passing of the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920, and now, I do not say the inconsistency, but the distinction between the general on the one hand and the particular on the other hand became more clearly marked. By s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it was provided among other things that "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless," and then follows a series of different exceptions, and one of those exceptions is (*e*), which is in these terms: "Unless the landlord is a local authority or a statutory undertaking and the dwelling-house is reasonably required for the purpose of the execution of the statutory duties or powers of the authority or undertaking, and the Court is satisfied as aforesaid as respects alternative accommodation." That stage having been reached one finds in the one statute a general reference to the execution of statutory duties or powers, while in another statute—namely, the Housing, Town Planning, &c., Act of 1919—there is a reference to certain limited powers which are however statutory. Then came the Act of 1923. By the Housing, &c., Act of 1923 it was provided that certain "minor amendments," as they are called in the marginal note to s. 16, should be made. Sect. 16 is: "The amendments specified in the second column of the second schedule to this Act (relating to

1924

PARRY v. HARDING.

Lord Hewart C.J.

minor amendments of Housing Acts) shall be made in the provisions of the Housing Acts specified in the first column of that schedule." Turning to that schedule one finds that it is provided with reference to s. 35 of the Housing, Town Planning, &c., Act of 1919, "for the words ' (War Restrictions) Act, 1915,' there shall be substituted the words ' (Restrictions) Act, 1920.' " Substituting those words and reading them together with s. 35 of the Housing, Town Planning, &c., Act of 1919, one gets this result: Nothing in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or in the enactments amending that Act, &c., shall be deemed to affect, &c., or to prevent a local authority from obtaining, &c. At that moment therefore there was the clearest possible contrast or antithesis between the general words of s. 5 of the Rent Restrictions Act, 1920, relating to statutory powers not otherwise defined and the particular words of s. 35 of the Act of 1919 referring to statutory powers of a defined and limited character. The contradiction, if contradiction there be, was complete and was exhibited in a clear light at that stage. What followed? There was yet another Act, the Rent Restrictions Act of 1923, and that Act by s. 4 substituted a new s. 5 in the principal Act, that is to say, the Act of 1920. When one looks at the newly substituted section in comparison with the old section upon the particular matter now under consideration it appears that the difference is comparatively slight. The new exception is as follows: "Unless the dwelling-house is reasonably required for the purpose of the execution of the statutory duties or powers of a local authority, or statutory undertaking or for any purpose which, in the opinion of the Court, is in the public interest, and the Court in either case is satisfied as aforesaid as respects alternative accommodation." In other words where a local authority in pursuance of a purpose coming within s. 35 of the Act of 1919 desires to obtain possession of a dwelling-house, the necessity of providing or showing alternative accommodation does not exist. But the circumstances in which a local authority may, upon satisfying the Court that there is alternative accommodation, obtain

possession of a house in general are extended. It is now possible to take that course not merely in the execution of statutory duties or powers in general, that is to say other than those mentioned in the Act of 1919, but also for any purpose which in the opinion of the Court is in the public interest.

I have come to the conclusion, therefore, reluctantly, that the intention of the Legislature was to preserve the saving contained in s. 35 of the Act of 1919; that saving applied originally to the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915; it applied afterwards to the Act of 1920; it applies, in my opinion, to that substituted section of the Act of 1920 which is created by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923.

In my opinion therefore the contention of the Town Clerk was right. Reference has been made to the words, and I repeat them, of the Earl of Selborne in the case of *Seward* v. *Owner of the Vera Cruz* (1): "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." In my opinion this case is a fortiori the kind of case he contemplated, because here, although the method is circuitous, and, if I may say so with respect, much to be deplored, the Legislature has I think shown a certain intention to make the particular co-exist with the general. There is a general rule, there is a particular exception; by the exercise of diligence it is possible to ascertain how the two at different stages are related to each other. For these reasons I think this appeal should be allowed.

AVORY J. In this case I sympathise with the view taken by the magistrates, and I regret that the case has not been argued on both sides. Speaking for myself I should have

(1) (1884) 10 App. Cas. 59, 68.

1924

PARRY v. HARDING.

AVORY J.

been glad to have found an argument which would be consistent with the general application of the provision of the Rent and Mortgage Interest Restrictions Act of 1923 to all cases where tenants of these small dwellings are turned out without any alternative accommodation being found for them. I need not repeat what has already been so well said by my Lord as to the character of this legislation. He has found a clear way through this labyrinth and I am prepared to follow him with this observation only, that the whole of this trouble might have been avoided if the Legislature in the year 1923 had been aware when they were passing the Rent and Mortgage Interest Restrictions Act of 1923 that they were also passing the Housing, Town Planning, &c., Act of 1923. It is quite obvious that the same persons could not have drawn the two Acts; the same persons cannot have exercised their judgments upon them, if anybody exercised any judgment at all upon them, because the difficulties which have arisen would all have been obviated if in s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, when they said that no order shall be made for the ejectment of a tenant unless the dwelling-house is reasonably required for the purpose of the execution of the statutory duties or powers of a local authority, they had added the words "other than their duties or powers under the Housing Acts." It certainly appears that there is in the Housing Acts a special provision applicable to the one case where the local authority are exercising their powers under those Acts, and the result is that if they are exercising their powers under the Housing Acts, there is no obligation to provide alternative accommodation, but if they are merely widening a road and doing exactly the same thing under another Act of Parliament, then they are bound to provide alternative accommodation. It may be if the Legislature ever has time to attend to this matter in a reasonable spirit that they will see fit to alter this state of things.

SALTER J. I agree that this appeal succeeds. The series of statutes, it seems to me, show an intention on the

1924

PARRY v. HARDING. Salter J.

part of the Legislature that the protection given to small tenants by the Rent Restriction Acts shall not hamper the making of improvements under the Housing, Town Planning, &c., Acts. The present appellant is protected against the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by the Housing and Town Planning Acts of 1919 and 1923. The question is whether this protection is taken away by the Rent and Mortgage Interest Restrictions Act, 1923. I see no indication in that statute of any such intention.

Appeal allowed. Case remitted.

Solicitor: *H. Lloyd Parry, Town Clerk, Exeter.*

F. C.

[IN THE COURT OF APPEAL.]

C. A.

1924

Oct. 20.

BOSWELL *v.* CRUCIBLE STEEL COMPANY.

Leave—Covenants—"Landlord's Fixtures."

In a lease of a house the term "fixture" means something which is affixed to the premises after the structure of the house is completed. It does not include things which form part of the original structure itself.

A tenant of business premises, the sides of which mainly consisted of plate-glass windows of the ordinary kind which do not open, covenanted to repair (inter alia) the landlord's fixtures:—

Held, that as the windows formed part of the structure of the house, the covenant did not extend to them.

APPEAL from Divisional Court.

By a lease made in May, 1912, the plaintiffs let the ground floor of the premises known as 31 and 32 Borough Road and 69 Lancaster Street, Southwark, for a term of years. The premises were let for the purpose of being used as a warehouse and offices for the lessees' trade, and practically the whole of the sides fronting the streets in question consisted of plate-glass windows. The windows were of the usual kind, and were not made to open.

C. A. 1924

BOSWELL v. CRUCIBLE STEEL CO.

By the terms of the lease the lessees covenanted to "keep the inside of the demised premises including all landlord's fixtures in good repair." The lessors covenanted to "repair . . . . the demised premises with all necessary reparations . . . . except such repairs as are hereby agreed to be executed by the lessees."

In August, 1923, it was found that seven of the plate-glass windows were broken by the acts of mischievous persons outside. The plaintiffs gave the defendants notice to replace them, contending that they were landlord's fixtures within the meaning of the lessees' covenant, and, on the defendants refusing compliance, brought this action in the Southwark County Court to recover the cost of replacing the windows. The county court judge held that the windows were landlord's fixtures and gave judgment for the plaintiffs. On appeal the Divisional Court (Bailhache and Roche JJ.) affirmed the decision of the county court judge.

The defendants appealed.

Greaves Lord K.C. and *Done* for the appellants. These windows were not fixtures at all. They were part of the walls of the house. The county court judge indeed held as a fact that they were not part of the walls, but there was no evidence on which he could so hold. If the windows were not where they are the house would cease to exist as a house. Then, if they were really part of the walls of the house, it is absurd to describe them as fixtures. A fixture is something which is put into a house after the building is completed. The county court judge relied upon a dictum of Willes J. in *Climie* v. *Wood* (1) as supporting his view. "Things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows." But all that the learned judge there meant was that windows were not removable by the tenant, not that they came within the description of fixtures. That external windows are properly regarded as

(1) (1869) L. R. 4 Ex. 328, 329.

part of the wall of a house appears from the language of Bramwell L.J., when delivering the judgment of the Court of Appeal in *Ball* v. *Plummer*. (1) That was an action by the tenant of a public-house against his landlord for breach of his covenant to do the outside repairs, among the repairs claimed being the mending of broken windows. His Lordship said: "As to the question of the broken windows it was clear that the mending of them came under the head of 'outside repairs,' the windows being part of the skin of the house, and that therefore the defendant was bound to mend them."

Hon. Sir Reginald Coventry K.C. and *A. H. Woolf* for the respondents. All chattels which are annexed to the soil are fixtures. Such fixtures are of two kinds, tenant's and landlord's. Tenant's fixtures are those which a tenant is entitled to remove during his term. All those which a tenant is not entitled to remove are landlord's fixtures. It is clear the lessees could not remove these windows, therefore they are landlord's fixtures and the lessees are bound under their covenant to repair them. Willes J., delivering the judgment of the Exchequer Chamber in *Climie* v. *Wood* (2), treats windows as fixtures.

BANKES L.J. I am of opinion that this appeal should be allowed. The question depends upon what the original structure of the house was. From the plan which was put in at the trial it appeared that this ground floor, which was of a total height of 11 feet, was enclosed in brick walls to a height of 3 feet 6 inches supporting plate-glass windows 7 feet 6 inches high, and occupying in width, on the Borough Road front 29 feet out of a total width of 33 feet, and in Lancaster Street 23 feet out of a total width of 25 feet; so that we have to deal with a building the ground floor of which was so constructed that its walls, or, to use what is perhaps the better expression of Bramwell L.J. in *Ball* v. *Plummer* (1), "the skin of the house," consisted to a large extent of glass. That being so the lease contains two covenants to repair, one by the lessees to repair "the inside of the demised premises

(1) Times Newspaper, June 17, 1879. (2) L. R. 4 Ex. 328.

C. A. 1924

BOSWELL v. CRUCIBLE STEEL CO.

Bankes L.J.

including all landlord's fixtures," and the other by the lessors to repair the whole of the demised premises except so far as their repair is covered by the lessees' covenant, and the question is which party is to keep these windows in repair. The lessors contend that the windows are landlord's fixtures, and that the liability consequently falls on the lessees; but I do not think that contention can be allowed. It is impossible to say that windows such as these, forming part of the original structure of the house, are landlord's fixtures. The county court judge was wrong in law in holding that these windows were not part of the walls of the house.

SCRUTTON L.J. In this case the question is whether the landlord or the tenant is to replace certain broken windows. The premises consist of a ground floor used as a warehouse and offices, and it appears from the photograph and plan which were put in that the greater part of the outer sides of the building consists of plate-glass windows, so that the premises are practically enclosed in a wall of glass. In the lease the tenant covenanted to repair the inside of the demised premises, "including all landlord's fixtures," and the landlord covenanted to repair "the demised premises," except so far as the tenant had covenanted to repair them. Some of the plate-glass windows having been broken, the landlord claims that they are landlord's fixtures and that the liability to repair them falls on the tenant. The meaning of the term "tenant's fixtures" is well understood, but I have always had a difficulty in understanding what is meant by "landlord's fixtures." But at all events it seems to me clear that that expression cannot include a thing which forms part of the original structure of the building. It must be regarded as confined to things which have been brought into the house and affixed to the freehold after the structure is completed. If these windows could be treated as landlord's fixtures, the whole house would be a landlord's fixture. Then, if they are not landlord's fixtures, the landlord is bound to repair them, for they were plainly part of the demised premises. The

county court judge held that the windows were not part of the wall of the house. Therein I think he was wrong.

Atkin L.J. This is an action on a covenant in a lease. The lessees covenanted to "keep the inside of the demised premises, including all landlord's fixtures," in good repair, and the question is whether that covenant included the plate-glass windows which formed the greater part of the external walls of the house. I should be inclined to construe the covenant as limited to landlord's fixtures inside the house, so that even if the windows could be regarded as landlord's fixtures, the liability to repair them would not fall on the lessees. But it is not necessary to decide that, for I am quite satisfied that they are not landlord's fixtures, and for the simple reason that they are not fixtures at all in the sense in which that term is generally understood. A fixture, as that term is used in connection with a house, means something which has been affixed to the freehold as accessory to the house. It does not include things which were made part of the house itself in the course of its construction. And the expression "landlord's fixtures," as I understand it, covers all those chattels which have been so affixed by way of addition to the original structure, and were so affixed either by the landlord, or, if by the tenant, under circumstances in which they were not removable by him. As these windows were part of the original structure, representing the walls of the house, so that without them there would be nothing that could be described as a warehouse at all, they cannot come under the head of landlord's fixtures. If they could, every brick used in the building would be a landlord's fixture. I think that the county court judge misdirected himself on a question of law, and that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Cardew, Smith & Ross.*
Solicitor for the respondents: *H. Anderson.*

J. F. C.

1924
Oct. 31;
Nov. 7.

GUNTER *v.* DAVIS.

[1923. G. 2914.]

Ejectment—Trespasser—Premises within Increase of Rent and Mortgage Interest (Restrictions) Act, 1920*—Right of Plaintiff to Costs—"Claim or other proceedings arising out of this Act"—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 17, *sub-s.* 2.

The plaintiff obtained judgment against the defendant, who was a trespasser, for possession of premises which by reason of their rental were within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:—

Held, that although the premises were within the Act, the claim for possession against a trespasser was not one "arising out of this Act" within the meaning of s. 17, sub-s. 2, and that, consequently, the plaintiff was entitled to costs.

Dictum of Atkin L.J. in *Gill* v. *Luck* [1923] W. N. 284; 93 L. J. (K. B.) 60, 62 not followed.

ACTION tried before McCardie J.

The plaintiff, Robert Geoffrey Gunter, was the owner of a dwelling-house and premises, 4, Edith Villas, Fulham, in the county of London. Their rental value was 75*l.* per annum, and they were therefore premises to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17) applied. By an indenture dated April 22, 1845, the predecessor in title of the plaintiff leased the said premises for eighty years from June 24, 1843. On the expiration of the lease on June 24, 1923, the defendant, Richard John Davis, was in occupation of the said premises, and the action was brought by the plaintiff as reversioner to recover possession. The defendant, by his defence, alleged that he occupied as a sub-tenant to a Mrs. Woolley, in whom the above lease of April 22, 1845, had been vested, and claimed that on the expiration thereof on June 24, 1923, he became a statutory tenant of the plaintiff under the provisions of s. 15, sub-s. 3, of the Increase of Rent, &c. (Restrictions), Act, 1920; but McCardie J. held that the defendant had never had a tenancy of and no right or title to the possession of the premises, and that he was a trespasser, and gave judgment against him for possession and for mesne profits. On judgment being given

as above stated, it was contended on behalf of the defendant, that by reason of the provisions of s. 17, sub-s. 2, of the Act (1), the plaintiff was not entitled to any costs, it being contended that this was a claim or proceeding "arising out of this Act" within the meaning of the sub-section.

Salter Nichols for the defendant. The plaintiff is not entitled to any costs. Sect. 17, sub-s. 2, of the Act of 1920 was framed with the intention of keeping proceedings for the recovery of possession of small houses in the county court, and this is the view expressed by Atkin L.J. in *Gill* v. *Luck* (2), where he said: "When it is shown that the house is within the Act proceedings to recover it must arise out of the Act." And Bankes L.J. said (3): "If, therefore, the plaintiff brings an action of this kind in the High Court, he does so at his own risk as regards the recovery of costs." No doubt these were obiter dicta, but they correctly state the law. The only thing to be looked at is whether the premises are within the Act, apart from any question of tenancy, and it is admitted that the premises in question are within the Act.

Wilfrid Price for the plaintiff. This claim does not arise "out of this Act" within the meaning of s. 17, sub-s. 2, nor did the plaintiff "take proceedings under this Act." He did not rely on the Act at all. It is true that the defendant set up a defence based on the Act, but that fact does not cause the claim to be one arising out of the Act. In *Wolff* v. *Smith* (4), in which Eve J. refused costs to a plaintiff under this sub-section, it was necessary for the plaintiff to invoke the Rent, &c. (Restrictions) Act in order to prove his right

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17, sub-s. 2: "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

(2) [1923] W. N. 284; 93 L. J. (K. B.) 60, 62.

(3) 93 L. J (K. B.) 60, 62.

(4) [1923] 2 Ch. 393.

1924

GUNTER v. DAVIS.

to possession, therefore it was held that his claim was one arising out of the Act. In the present case it was unnecessary for the plaintiff to invoke the Act. The county court has not exclusive jurisdiction in possession cases; the jurisdiction of the High Court still subsists except in so far as it is cut down by the Act. The real point in *Gill* v. *Luck* (1) was whether Order XIV. was applicable or not, and the question as to the right to costs was not fully argued. And, moreover, in that case there had been a tenancy between the parties at one time, and that may distinguish the case from the present one. Although the words of s. 17, sub-s. 2, may seem wide enough to cover the case of a claim for possession against a trespasser, all the grounds, (*a*) to (*i*), upon which judgment for possession can be given, set out in s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), which was substituted for s. 5 of the Act of 1920 (by s. 4 of the former Act), are applicable to a tenancy only. It cannot be, where, for example, a defendant gets possession of a house by a trick, that the plaintiff can only get repossession of it on one of the grounds set out in s. 4 of the Act of 1923. The very name of the Act, "Increase of Rent," shows that the Act is dealing only with cases of tenancy.

McCARDIE J. The plaintiff in this case was the owner of a villa in Fulham, a lease of which as from June 24, 1843, had been granted by his predecessor in title, and he brought this action against the defendant to recover possession on the ground that he had wrongly had possession thereof since June 24, 1923, when the said lease expired; and the plaintiff also claimed mesne profits. One of the intermediate assignees, a Mrs. Woolley, died in August, 1922, leaving no will nor administrator. The defendant, who was a connection of Mrs. Woolley, remained on the premises, and was there on June 24, 1923. I was satisfied at the trial that the defendant had no right or title to remain in possession, and he had paid no rent. He was in fact a trespasser. On November 8, 1923, the writ was issued by the plaintiff, and on March 28,

(1) [1923] W. N. 284; 93 L. J. (K. B.) 60.

1924

GUNTER v. DAVIS.

McCardie J.

1924, the defendant gave up possession, but refused to pay anything in respect of his occupation after June, 1923. At the trial I gave the plaintiff judgment for mesne profits at the rate of 75*l.* per annum. Thereupon it was contended on behalf of the defendant that the plaintiff was not entitled to costs, on the ground that this was a claim or proceeding "arising out of this Act" within the meaning of s. 17, sub-s. 2, of the Increase of Rent, &c. (Restrictions) Act, 1920. Is that contention right? It is a serious point, because if it is right it will cut down in a very drastic fashion the ejectment jurisdiction of the High Court, because by s. 12, sub-s. 2 (*a*), of the Act it is applicable to all houses in London where the rent does not exceed 105*l.* Now at the trial the defendant raised the contention, which it was not easy to understand, that in some way he had obtained a title to the possession of these premises, and that consequently he was entitled to rely on the Rent Restrictions Acts. Sect. 17, sub-s. 2, is as follows: [His Lordship read it. (1)] I think the sub-section must be read as a whole, and so reading it I have no doubt that it was intended to deal with claims or proceedings concerning the particular matters referred to in the Act—e.g., recovery of overpaid rent under s. 14. If sub-s. 2 of s. 17 is limited in that way, then it does not cover this case. But I am bound to give a more extended application to the sub-section if I follow the judgment of Eve J. in *Wolff* v. *Smith* (2), and to hold, that if a plaintiff can only maintain an action for recovery of possession by invoking the Act of 1920, the action must be deemed to fall under the provisions of s. 17, sub-s. 2, thereof, as one "arising out of this Act." I accept that view, though perhaps a different view might be taken. Does s. 17, sub-s. 2, go further? Prima facie in my opinion it does not, and the only support for the view that it does are the dicta of Bankes and Atkin L.JJ. in *Gill* v. *Luck.* (3) The question in that case arose in this way. The plaintiff had brought the action to recover possession of a dwelling-house, which by virtue of its rental clearly fell under the provisions

(1) See note (1) ante, p. 125.
(2) [1923] 2 Ch. 393.
(3) [1923] W. N. 284; 93 L. J. (K. B.) 60, 62.

1924

GUNTER v. DAVIS.

McCardle J.

of the Rent, &c. (Restrictions) Act, 1920. He had obtained judgment under Order XIV. from the Master, which was confirmed by the judge in chambers, and the point at issue for the Court of Appeal was whether Order XIV. applied at all, having regard to the provisions of the Rent, &c. (Restrictions) Act, 1920, particularly of s. 5. The substance of the decision was that it did not, and it was only by accident that the present point arose, on the question of costs, and having arisen accidentally and not being argued at length—s. 17 only being referred to and no cases cited—certain obiter dicta were pronounced. That of Bankes L.J. (1) is ambiguous, and may or may not cover this case. But with the greatest respect I cannot follow the dictum of Atkin L.J., where he says (2): "When it is shown that the house is within the Act proceedings to recover it must arise out of the Act, because they cannot be enforced unless the conditions imposed by the Act are fulfilled." In my view the action of ejectment in the present case was not brought by virtue of the provisions of the Act of 1920. It does happen accidentally that the premises fall within the rental limit fixed by s. 12, sub-s. 2 (*a*), of the Act, but apart from that circumstance the Act has nothing to do with the case, and, broadly speaking, my view is that, save as cut down by the Act all the common law rights of a landlord remain. Now here the landlord brought his action against a trespasser, and his action was an ordinary action of ejectment, and the writ was indorsed in the ordinary way. That being so the defendant is unable to destroy the plaintiff's prima facie right to costs by an ingenious, but unsustainable contention. The result is that I hold that the plaintiff is entitled to costs.

I think it my duty to say, although after full argument I am unable to agree with the dictum of Atkin L.J. in *Gill* v. *Luck* (2), that if it were necessary a clear distinction can be drawn between that case, where the relation of landlord and tenant had once subsisted between the parties, and

(1) 93 L. J. (K. B.) 60, 62.
(2) [1923] W. N. 284; 93 L. J. (K. B.) 60, 62.

the present case, where there never was that relation. My judgment is not inconsistent with the decision in *Bensusan* v. *Bustard*. (1)

1924

GUNTER v. DAVIS.

Judgment for plaintiff with costs.

Solicitors for plaintiff: *Tomlin & Dinwiddy.*
Solicitor for defendant: *Richard John Davis.*

W. L. L. B.

ALLARD, APPELLANT *v.* SELFRIDGE AND COMPANY, LIMITED, RESPONDENTS.

1924
Nov. 7, 10.

Merchandise Marks—Sale with false Trade Description—Reasonable Precautions not taken—"Otherwise . . . . acted innocently"—Mens rea—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2.

The Merchandise Marks Act, 1887, s. 2, sub-s. 2, provides that: "Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any . . . . false trade description is applied . . . . shall, unless he proves (*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the . . . . trade description; and (*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (*c*) that otherwise he had acted innocently; be guilty of an offence against this Act."

The respondents were prosecuted under the above sub-section for having sold a pair of stockings as silk which were not silk. The sale was proved and the fact that the stockings were not silk. The magistrate found that all reasonable precautions had not been taken by the respondents against committing the offence, but that their servant, in conducting the sale, had acted in perfect good faith and had not been guilty of fraud. The magistrate, relying upon *Christie, Manson and Woods* v. *Cooper* [1900] 2 Q. B. 522, held that to constitute the offence there must be mens rea in the sense of an intention to defraud, and in view of his finding of the absence of such an intention on the part of the respondents he dismissed the information:—

Held (1.) that, to constitute the offence, mens rea in the sense in which that expression was used by the magistrate need not be shown; it was sufficient to show mens rea in the sense that there was an intention on the part of the respondents to do the act forbidden by the sub-section; (2.) that proof by the respondents of part of para. (*a*) could not be relied upon by them as showing that "otherwise they had acted innocently"

(1) [1920] 3 K. B. 654.

1924

ALLARD v. SELFRIDGE & CO.

within para. (*c*); and therefore (3.) that on the magistrate's findings there ought to have been a conviction.

Christie, Manson and Woods v. *Cooper* [1900] 2 Q. B. 522 must be read strictly in relation to its special facts, and is not to be extended.

CASE stated by a metropolitan police magistrate.

On the hearing of an information against the respondents, charging them with having unlawfully sold a pair of stockings to which a false trade description was applied, to wit, "silk," contrary to s. 2, sub-s. 2, of the Merchandise Marks Act, 1887 (1), it was proved that the respondents had sold a pair of stockings as silk, and that the stockings were not silk, but it was contended on behalf of the respondents that all reasonable precautions had been taken against committing an offence against the Act, and that the respondents' servant had no reason to suspect at the time of the sale the genuineness of the trade description, and, therefore, that they had complied with s. 2, sub-s. 2 (*a*) and (*b*), of the Act, and were entitled to be acquitted.

The magistrate decided that all reasonable precautions had not been taken by the respondents, but he also decided that in conducting the sale the respondents' servant had acted in perfect good faith, and had not in any way been guilty of fraud.

Upon this it was contended for the respondents that the case fell within s. 2, sub-s. 2 (*c*)—namely, that they had acted innocently—and reliance was placed on *Christie, Manson and Woods* v. *Cooper* (2), where Channell J. said that to constitute the offence mens rea was necessary.

For the appellant it was contended that mens rea or fraudulent intent was not necessary to constitute the offence, and reliance was placed on *Stone* v. *Burn.* (3)

In his judgment, which was annexed to and formed part of the case, the magistrate said: "I have to say whether all reasonable precautions having been taken, the purchaser had no reason to suspect the genuineness of the . . . . trade description. Now this lady [the respondents' buyer] purchased

(1) The sub-section is set out in the headnote.

(2) [1900] 2 Q. B. 522.

(3) [1911] 1 K. B. 927.

these goods from a man named Weissberger; he represents himself to be a manufacturer and importer, but it is clear that he was not in a very large way of business; it is a name that is not known at all. . . . . It does not seem to me that she made any inquiries as to whether he was a person of reputation or not. . . . . Then she purchases these stockings; she applies a very superficial test, merely handling and looking at them, and upon that she pronounces them to be silk. At the time she knew of two very simple tests which she herself might have applied—the strength of fibre test, and the burning test—and she also knew of the nitric acid test, and the only reason she seems to give for not applying these tests is that it might have involved the destruction of one of the stockings. . . . . I find there was negligence on the part of [the respondents' buyer]. Then I come to the most difficult part of the case, whether the defendants acted innocently. They are responsible for everything [their buyer] did, and if she acted innocently they have the advantage of it. Did she act innocently? She did act innocently, unless negligence is not innocence. I do not think upon the judgment in *Christie, Manson and Woods* v. *Cooper* (1) that negligence cannot be considered innocence, because it speaks of the mens rea, that means intent to cheat or intent to defraud, not mere negligence, and the judges say that if the mens rea can be proved to be absent then no offence is committed. I therefore come to the conclusion that [the respondents' buyer] was not guilty of any mens rea, but was absolutely innocent. Therefore upon those considerations I must dismiss the summons."

Sir Duncan Kerly K.C. and *H. D. Roome* for the appellant. The magistrate was wrong in holding that he was bound to acquit because there was no evidence of mens rea. Sect. 2 of the Merchandise Marks Act, 1887, tabulates the offences under the Act. For a person to apply a false trade description to goods is an offence, unless he can bring himself within the exemptions specified in s. 2. It is necessary that he should either prove the facts enumerated in sub-ss. 2 (*a*) and 2 (*b*), or

(1) [1900] 2 Q. B. 522.

1924

ALLARD v. SELFRIDGE & Co.

that "otherwise" he has "acted innocently" within the meaning of sub-s. 2 (*c*). Paragraph (*c*) must mean something of a different character from the matters mentioned in sub-ss. 2 (*a*) and 2 (*b*). The magistrate wrongly put the onus on the prosecution. The sub-section casts upon the seller, if he chooses to give a trade description, the duty of giving a true one; and an offence may be committed although there is no intent to defraud.

[They referred to *Rex* v. *Wheat and Stocks* (1); *Christie, Manson and Woods* v. *Cooper* (2); *Starey* v. *Chilworth Gunpowder Co.* (3); and *Wood* v. *Burgess.* (4)]

Hawke K.C. and *Frampton* for the respondents. The Act makes it an offence for a person to apply a false trade mark or a false trade description to goods; but if that person acted innocently he is to be acquitted. The Act is for the protection of trade marks and trade descriptions, but it does not throw upon traders who act honestly too great a burden. It says that the trader may prove his innocence by proving that he acted innocently otherwise than by proving the matters set out in s. 2, sub-s. 2, paras. (*a*) and (*b*). In fact it is found that the respondents acted innocently. *Christie, Manson and Woods* v. *Cooper* (2) is in the respondents' favour. Channell J. there said that to establish this offence there must be a mens rea in fact, and if the person charged is able to prove an absence of mens rea he is entitled to be acquitted. In *Stone* v. *Burn* (5) the decision in *Christie's* case (2) was accepted as good law.

No reply was called for.

LORD HEWART C.J. stated the facts and continued: The magistrate has decided the case upon the view that for the purposes of this part of the statute mens rea means an intent to cheat or defraud; and the question is whether he was right in that view. Much has been said upon the scheme of this legislation, but the real contention made both before the

(1) [1921] 2 K. B. 119, 126.
(2) [1900] 2 Q. B. 522.
(3) (1889) 24 Q. B. D. 90.
(4) (1889) 24 Q. B. D. 162.
(5) [1911] 1 K. B. 927.

magistrate and in this Court—a contention said to be derived from the judgments in *Christie, Manson and Woods* v. *Cooper* (1)—is that the words in s. 2, sub-s. 2 (*c*) : "that otherwise he had acted innocently," are sufficient to enable a person to make good a defence by proving a part, and only a part, of what is contained in paras. (*a*) and (*b*). The sub-section is dealing with a considerable variety of matters as to which it is quite obvious that very different considerations may apply. The sub-section is dealing at one and the same time with selling, exposing for sale, having in possession for sale or any purpose of trade or manufacture, any goods which in some one or other of a variety of ways offend. The charge here was selling a pair of stockings to which a false trade description was applied. A person who does that is guilty of an offence against the Act unless he proves certain things ; in other words, the scheme of the Act, which is undoubtedly rigorous and intended to deal with offences of a notorious and at one time at any rate of frequent occurrence, is that when certain acts are proved, the proof of the offence is complete unless the defendant is able to discharge the burden which the statute puts upon him. What defences are open to the defendant ? There is a clear division of a two-fold nature : the defendant may prove the matter contained in paras. (*a*) and (*b*), which are united by the conjunction "and" ; but apart altogether from those paragraphs, he may prove para. (*c*), the language of which is not "that he had acted innocently," but "that otherwise he had acted innocently" ; in other words, there is the clearest possible dichotomy. If the defendant proposes to prove that which is contained in paras. (*a*) and (*b*), that is one line of defence, but if the circumstances are such that while his defence is of that nature it is built upon materials that are incomplete, he cannot have recourse to para. (*c*) for the purpose of establishing a portion of that which is alleged in paras. (*a*) and (*b*). To hold the contrary would be destructive of this part of the section and would involve what appear to me to be at least two absurdities ; first, it would involve the conclusion that paras. (*a*) and (*b*) contain a mere illustration of

(1) [1900] 2 Q. B. 522.

1924

ALLARD v. SELFRIDGE & Co.

Lord Hewart C.J.

the kind of defence which may be put forward, and secondly, that the word " otherwise " is to be omitted from para. (*c*). The sub-section, as I understand it, means that if a defendant seeks to excuse himself upon the ground that he had no reason to suspect the genuineness of the trade description he must lay the foundation of that defence by establishing that he has taken all reasonable precautions ; in other words, the section in effect says that it is no excuse for the defendant to say that he had no reason to suspect the genuineness of the trade description unless he shows that he has taken all reasonable precautions. Here there was a failure to take all reasonable precautions, and therefore the defence, based upon the absence of reason to suspect the genuiness of the trade description, was impracticable. What then was the defence raised ? It was that in some way, other than that referred to in para. (*a*), the respondents had acted innocently. They sought to show that although reasonable precautions had not been taken, there was nevertheless no reason to suspect the genuineness of the trade description. The argument involves reading the words of para. (*a*) not as they appear in the statute but as if they were, " Having taken or not taken, as the case may be, all reasonable precautions against committing an offence he had at that time no reason to suspect the genuineness of the trade description " ; which seems to me to be nonsense.

An argument was based upon *Christie, Manson and Woods* v. *Cooper* (1), and certain passages in the judgments appear to afford some slight assistance to the argument for the respondents. In my opinion the judgments in that case must be read strictly in relation to the special facts there being considered, and they are not to be extended. There it appeared that Christie, Manson and Woods had described in their catalogue as Dresden china something which was not Dresden china, and upon which there were certain marks resembling the trade mark of Dresden china. Fortunately, however, before the sale took place the sellers' attention was drawn to the true facts, and, accordingly, when at the sale the lot in question was reached the sellers said to those present

(1) [1900] 2 Q. B. 522.

that they would sell it only for what it was. In other words, the sellers were not putting forward the untrue mark as being a true mark; they were doing their best to erase or obliterate the false trade mark from the article. They could not, nor did they attempt to, do it physically, but by words they endeavoured to render the falsity of the mark of no effect. That being so, the Court thought that the conviction should be quashed. When the decision in that case is compared with that given ten years later in *Stone* v. *Burn* (1) the limitations upon the earlier case seem to be reasonably clear. In *Stone* v. *Burn* (1) the appellant, who was a bottler of beer, had in the course of his business come into possession of certain bottles belonging to the Felinfoel Brewery Company, whose name was embossed thereon. The appellant filled those bottles with Bass's beer, and placing Bass's labels on the bottles, sold the contents as Bass's beer. It was held that he had applied a false trade description—the name of the Felinfoel Brewery Co.—none the less because the fact that Bass's labels were on the bottles would prevent a reasonable purchaser from supposing that he was buying the Felinfoel Brewery Company's beer. Pickford J. there said (2): "In *Christie, Manson and Woods* v. *Cooper* (3) the Court did indeed quash a conviction on the ground that the appellant had acted innocently and that the magistrate was bound in law so to find. I confess I share the doubts expressed there by Channell J. as to whether the question is one for the Court, or whether the case ought not rather to be remitted to the magistrate for reconsideration. But that case was a very different one from the present." Lord Coleridge J. said this (2): "The only defence could be that he was acting innocently. But, as was said by Channell J. in *Christie's* case (3), 'the innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament.' Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact. And here the appellant knew all the facts—his only mistake was as to the effect of the statute."

(1) [1911] 1 K. B. 927. (2) [1911] 1 K. B. 933.
(3) [1900] 2 Q. B. 522.

1924

ALLARD v. SELFRIDGE & CO.

Lord Hewart C.J.

In this case the magistrate appears to have fallen into two errors: first, he paid insufficient attention to the structure of the paras. (*a*), (*b*) and (*c*) of s. 2, sub-s. 2, with the result that the word "otherwise" has been overlooked. He seems to have thought that a defendant can establish innocence by proving a portion of what is contained in para. (*a*), and thus bring himself within para. (*c*). Secondly, the magistrate has clearly taken the view that mens rea for this purpose means intent to cheat or intent to defraud. That I think is an erroneous view. "Innocence" for this purpose means "innocence of any intention to infringe the Act of Parliament." It has been said, and said truly, that the phrase "innocence of any intention to infringe the Act of Parliament" is capable, at any rate for the purposes of controversy, of two interpretations. But what the words mean is innocence of an intention to do the act which is forbidden by the statute. It is unnecessary to inquire how much is involved in the words in para. (*c*), "otherwise he had acted innocently," but it is quite obvious when one looks at the great variety of transactions, acts or states contemplated by s. 2, sub-s. 2, that in different circumstances different facts may afford a defence under that heading. This at least is clear, that where the term "he had acted innocently" is qualified by the word "otherwise" the innocence which is spoken of cannot be a fragment of what is already referred to in paras. (*a*) and (*b*). In my opinion, therefore, this appeal succeeds, and the case must go back to the magistrate with a direction to convict.

SHEARMAN J. I agree with my Lord that the case might be decided on the bare word "otherwise" in s. 2, sub-s. 2, para. (*c*), of the Act, for a person charged with this offence cannot, if he establishes half of the requirements of para. (*a*), say that by proving that he comes within para. (*c*). But this case has been argued on wider grounds, and I therefore give my reasons upon these. In my judgment there were no facts upon which the magistrate could find, quite apart from the word "otherwise," that the respondents were innocent within the meaning of the Act. This is one of the many cases where

confusion has arisen by the loose use of the expression mens rea. The true translation of that phrase is criminal intention, or an intention to do the act which is made penal by statute or by the common law. It is true that under the old common law breaches of the laws of morality and crime were much the same. In a mass of cases mens rea involved moral blame, and the result is that people have got into the habit of translating the words mens rea as meaning guilty mind, and thinking that a person is not guilty of a penal act unless in doing what he did he had a wicked mind. That to my mind is wrong. What has to be considered in each case is what is the act struck at by the statute. I think the statute we are now considering is fairly clear. It absolutely forbids certain voluntary and intentional acts. Sect. 2, sub-s. 1, says that every person who forges or falsely applies a trade mark or false trade description to goods shall be guilty of an offence, unless he proves that he acted without intent to defraud. The onus is on him to show that. Other acts are struck at and absolutely forbidden by s. 2, sub-s. 2, and it was under this sub-section that the present proceedings were taken. The respondents were charged with selling an article to which a false trade description was applied; that is, intentionally selling it and intentionally applying to it that false trade description. The sub-section, however, says that if they prove certain things they are to be deemed not to be guilty; the onus is upon them to do this; they must prove what is set out in paras. (*a*) and (*b*) or in para. (*c*), and, if they do, the case against them is to be dismissed. Sub-ss. 1 and 2 are in different words, but the scheme is much the same. What the magistrate found in this case was that the stockings were sold deliberately and intentionally by the respondents' servant and described as silk when in fact they were not silk. That is proof of intention unless the respondents can excuse themselves under paras. (*a*) and (*b*) or under para. (*c*). They gave evidence under para. (*a*)—para. (*b*) did not apply, because apparently no demand was made; the whole of their evidence was an attempt to prove innocence under para. (*a*); and the magistrate held on the facts that they failed. It was then

1924

ALLARD v. SELFRIDGE & Co.

Shearman J.

argued on the authority of *Christie, Manson and Woods* v. *Cooper* (1) that notwithstanding the provisions of sub-s. 2 it was incumbent on the prosecution to prove moral guilt on the part of the respondents; and, accepting that argument, he dismissed the information. In doing so he was wrong in two ways—as to the onus of proof and as to the effect of the word "otherwise" in para. (*c*). *Christie's* case (1) was entirely misunderstood. On the facts of that case I am unable to see how the acquittal was justified. It was no doubt a trumpery offence, because Christies had sold an article bearing a forged mark, but being warned beforehand they told their purchasers not to rely on the mark. The Court in these circumstances held, in effect, that the mark had been erased, although in fact it was still on the article. Grantham J. held that Christies had acted bona fide and ought not to have been convicted. That is clearly acting upon the fallacy that under this Act a person who has acted honestly cannot be convicted. That is, I think, wrong. Channell J. put the matter upon the right basis. He said (2): "The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament." That is quite sound. He then added, what I am unable to understand: "It seems to me quite clear that there may be innocence of any intention to infringe the Act, even although there may be suspicion of the genuineness of the article or trade mark. That is what the word 'otherwise' means, as I think," and he went on to say that Christies had been innocent, notwithstanding the fact that they intentionally sold the china with the mark upon it. I think he laid down the right principle, but I have a difficulty in seeing that he rightly applied it. In *Stone* v. *Burn* (3) all three judges decided the case upon the right principle. Lord Alverstone C.J. said that the appellant, with no intention of doing anything wrong, by bottling Bass's beer in bottles belonging to and embossed with the name of the Felinfoel Brewery Company, had thereby applied a false trade description and was properly convicted, although he had acted

(1) [1900] 2 Q. B. 522. (2) [1900] 2 Q. B. 528.
(3) [1911] 1 K. B. 927.

quite honestly. Pickford J. referred to Channell J.'s judgment in *Christie's* case. (1) Lord Coleridge J. cited Channell J.'s observation that the "innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament." He added: "Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact." Therefore, for a person charged under this sub-section to be acquitted he must prove the absence of any intention to do the act forbidden by the statute. In this case there was no evidence upon which the magistrate could find the absence of an intention to do the act forbidden by the statute.

I only desire to add that *Starey* v. *Chilworth Gunpowder Co.* (2)—decided on s. 2, sub-s. 1—is entirely analogous to this case. There gunpowder, which was quite as good as what the sellers purported to sell, was sold with a false trade description. Lord Coleridge C.J., dealing with the words "unless he proves that he acted without intent to defraud," said that the word "defraud" was there used in the sense of intentionally selling to a purchaser an article which was not that which the purchaser was stipulating for. Mathew J. said: "On the fair construction of the Act I am of opinion that the words 'intent to defraud' mean more than an intent to cheat a customer. The Act makes a new offence by providing (in s. 2, sub-s. 1) that every person who applies any false trade description to goods shall be guilty of an offence against the Act. The words 'without intent to defraud' apply to cases where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be rejected." I think the plain meaning of this statute is that guilt or innocence is determined by the answer to the question whether intentionally an act has been done which is contrary to the words of the statute. In the present case the sale was intentional, the description false, and there was no evidence to show innocence of that intention. Therefore the case must go back to the magistrate.

(1) [1900] 2 Q. B. 522. (2) 24 Q. B. D. 90, 97.

1924

ALLARD v. SELFRIDGE & Co.

SALTER J. I agree, and if I add a word I only do so because there may have been some doubt on the decided cases as to the true meaning of the sub-section under consideration. A person who sells under the description of "silk" goods which are not in fact silk, is guilty of an offence against the Act unless he can prove certain things, and in the absence of such proof the law assumes that he intended to sell the goods under that description—that he intended to do the act forbidden by the statute; in other words, mens rea is assumed unless the person charged can prove either paras. (*a*) and (*b*) or para. (*c*). Paras. (*a*) and (*b*) constitute a defence. If he fails to prove paras. (*a*) and (*b*) he must be convicted unless he can prove para. (*c*), that is, in the present case, that there was no intention to sell the stockings under the description of "silk." Here the respondents failed to prove para. (*a*). They proved the absence of dishonesty, but failed to prove the absence of negligence; while as to para. (*c*) that was not proved, as it could not be contended that the respondents did not intend to sell the stockings under the description of "silk." There should therefore have been a conviction.

Appeal allowed.

Solicitors for appellant: *Vizard, Oldham, Crowder & Cash.*
Solicitor for respondents: *J. Barrington Matthews.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1924
Oct. 18;
Nov. 12.

HAMBROOK *v.* STOKES BROTHERS.

[1923. H. 3317.]

Negligence—Nervous Shock resulting from Fright—Extent of Duty—Fear for Safety of Third Persons as distinguished from Fear for One's own Safety—Remoteness of Damage.

The defendants' servant left a motor lorry at the top of a steep and narrow street unattended, with the engine running, and without having taken proper precautions to secure it. The lorry started off by itself and ran violently down the incline. The plaintiff's wife, who had been walking up the street with her children, had just parted with them a little below a point where the street makes a bend, when she saw the lorry rushing round the bend towards her. She became very frightened for the safety of her children, who by that time were out of sight round the bend, and who she knew must have met the lorry in its course. She was almost immediately afterwards informed by bystanders that a child answering the description of one of hers had been injured. In consequence of her fright and anxiety she suffered a nervous shock which eventually caused her death, whereby her husband lost the benefit of her services. In an action by the husband under the Fatal Accidents Act:—

Held (by Bankes and Atkin L.JJ.; Sargant L.J. dissenting), that, on the assumption that the shock was caused by what the woman saw with her own eyes as distinguished from what she was told by bystanders, the plaintiff was entitled to recover, notwithstanding that the shock was brought about by fear for her children's safety and not by fear for her own

Dictum of Kennedy J. in *Dulieu* v. *White & Sons* [1901] 2 K. B. 669 disapproved.

APPEAL from verdict and judgment at the trial before Branson J. and a jury.

The action was brought under the Fatal Accidents Act by a husband for the death of his wife alleged to be due to the negligence of the defendants. On May 1, 1923, a servant of the defendants, who was in charge of a motor lorry belonging to them, having brought it to a state of rest at the top of a steep street in Folkestone called Dover Street, left it unattended and with the engine running without taking proper precautions to prevent it from moving. In his absence the lorry started off by itself and charged down the steep incline. Dover Street is a very narrow street, the roadway being in some parts not more than six feet wide, and there is a bend in the lower portion

C. A. 1924

HAMBROOK v. STOKES BROS.

of it. The lorry was eventually brought to a standstill by running against the side of a house in Dover Street below the bend at a distance of about three hundred yards from the point at which it started. On the day in question the deceased, Mrs. Hambrook, whose house was at the bottom of Dover Street, and who was in the habit of accompanying her three children, a girl aged ten and two boys aged eleven and eight, for part of the distance on their way to school, walked with them from her house to a little below the bend in Dover Street, and then left them to go on to the school by themselves. Shortly afterwards she saw the lorry coming rapidly round the bend in her direction. She was not herself in any personal danger, as the lorry stopped some little distance short of where she was standing, and in any case she would have had ample time to step aside into a shop into a position of safety. But she became very anxious for the safety of her children, who by that time had got out of sight round the bend of the street, as she knew that owing to the narrowness of the street there was more than a possibility of their having been injured by the runaway lorry. A crowd collected and there were rumours of an accident. She inquired of the bystanders who it was who had been injured. A friend of hers came up and made inquiries among the crowd for her, and they were informed that a little girl with glasses had been taken away injured. It appeared that her little girl wore spectacles. Several witnesses spoke to the deceased being in a state of great agitation, tearing her hair and screaming. She hurried to the school to see whether her children had arrived there safely, and found the two boys there, but the girl was missing. She then went to the hospital, where she found her girl, who had been knocked down by the lorry and had suffered considerable injuries. Mrs. Hambrook was at the time three or four months advanced in pregnancy, and in consequence of what had happened she had a serious nervous shock, which brought about a severe hæmorrhage. From this she partially recovered, so much so that on June 6 she felt sufficiently well to go in a charabanc to the Derby, and again on June 21 to Ascot. On June 28 she became worse. On July 11 she was operated upon and a dead

fœtus was removed, and on July 16 she died. The plaintiff brought the action to recover damages for the loss of her services as manageress of his restaurant. In their defence the defendants admitted the negligence alleged, but objected that the shock alleged to have been sustained by the deceased was too remote. At the trial Branson J., following a dictum of Kennedy J. in *Dulieu* v. *White & Sons* (1), directed the jury that if the nervous shock which resulted in the woman's death was caused by fear for her children's safety as distinguished from fear for her own, the plaintiff could not recover. He also directed them that they must be satisfied that the injury from the shock would have caused her death even if she had not been foolish enough to go to the race meetings, and that if her unreasonable conduct in doing so precipitated the trouble the action failed. He left to them the question: "Was the death of the wife the result of shock produced by fear of harm to herself?" Their answer was, "Verdict for the defendants."

It did not appear clear upon the evidence whether the nervous shock to the deceased was caused by her realization of what had happened from the unaided evidence of her own senses, or whether it was due to what she was told by bystanders about the injured person being a little girl wearing glasses, and no question was asked of the jury upon that point. The plaintiff appealed upon the ground of misdirection.

Serjeant Sullivan K.C. and *Martin O'Connor* for the appellant. The case of *Victorian Railways Commissioners* v. *Coultas* (2), where the Privy Council held that damage caused by fright at an impending collision was too remote to support an action for negligence, can no longer be regarded as good law. It was dissented from by the Exchequer Division in Ireland in *Bell* v. *Great Northern Ry. Co. of Ireland.* (3) There an excursion train was too heavy for the engine to draw it up an incline, and the defendants' servants detached certain carriages, leaving the plaintiff's carriage attached to the engine. The detached carriages ran rapidly down the incline, whereupon the engine

(1) [1901] 2 K. B. 669, 675. (2) (1887) 13 App. Cas. 222.
(3) (1890) 26 L. R. Ir. 428.

C. A. 1924

HAMBROOK v. STOKES BROS.

was reversed and with the plaintiff's carriage started down hill in chase until brought up by a violent jerk. The plaintiff was put in a great fright, whereby she suffered a nervous shock. The Court held the damage was not too remote, following an earlier decision of the Irish Court of Appeal in *Byrne* v. *Great Southern and Western Ry. Co.* (1) In that case the defendants by negligently allowing some railway points to be open caused a train to enter a siding, break down the buffer at the end and the wall of a telegraph office in which the plaintiff was. The plaintiff, although not touched by the train, suffered a severe nervous shock from fright at seeing the wall falling. A verdict of 325*l.* damages having been found for the plaintiff, the Common Pleas Division and the Court of Appeal refused to disturb it. Those cases were followed in *Dulieu* v. *White & Sons* (2); and in *Coyle* v. *Watson* (3) Lord Shaw treated *Victorian Railways Commissioners* v. *Coultas* (4) as no longer capable of being regarded as good law. But in *Dulieu* v. *White & Sons* (2) Kennedy J., while holding that nervous shock caused by negligence may be actionable, qualified his proposition with this limitation, that "the shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself," and that shock arising from fear of injury to third persons is not enough. In both that case and in the two Irish cases the fear was of injury to the plaintiff, and this is the first case in which the correctness of Kennedy J.'s distinction has come in question. But it is contended that that distinction cannot be supported. If there is a duty not to shock by fear of the one kind there must equally be a duty not to shock by fear of the other. In *Wilkinson* v. *Downton* (5), where the defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident, and the plaintiff, believing the statement to be true, suffered a violent nervous shock, Wright J. held that those facts constituted a good cause of action. That decision was

(1) Unreported. Cited by Palles, C.B. 26 L. R. Ir. 441.
(2) [1901] 2 K. B. 669, 675.
(3) [1915] A. C. 1, 13.
(4) 13 App. Cas. 222.
(5) [1897] 2 Q. B. 57.

followed by the Court of Appeal in *Janvier* v. *Sweeney* (1), where the defendant, a detective, with the object of inducing the plaintiff by fear to commit a breach of her duty to her employer, said, "You are the woman we want. You have been corresponding with a German spy," whereby the plaintiff became ill from the fright caused. It was held that the defendant was liable. Those two decisions directly support the present plaintiff's contention. Secondly, the judge misdirected the jury in telling them that it was necessary to show that the same damage would have resulted from the shock, even if the deceased had not gone to the race meetings. The fact that the deceased's conduct may have aggravated the mischief did not necessarily prevent the shock from being the real cause of the death.

H. D. Samuels for the respondents. The judge's direction to the jury was right. *Dulieu* v. *White & Sons* (2) was decided twenty-three years ago, and Kennedy J.'s distinction between fear for one's own safety and fear for that of third persons has never before been questioned. In *Brown* v. *Glasgow Corporation* (3) Lord Hunter took precisely the same view as Kennedy J. There the pursuer, a married woman, who was pregnant, was walking on the footpath of a street just below a point where the street curved. She saw a tramcar of the defendants coming down an incline at a great speed out of control. Between her and the car was a dangerous turn, where to her knowledge an accident had occurred, and she was thrown into a state of terror lest the car should leave the rails and run her down. She averred that, "Through the careless and reckless actings of the driver . . . . the pursuer was thrown into a state of terror for her safety . . . . and received a severe nervous shock, resulting in serious injury to her health." The defenders argued that the action was irrelevant, but the Lord Ordinary sent the case for proof and the Court adhered. In the pursuer's averments there was considerable reference to what occurred after the car had passed her; it left the rails and crashed into a standard, whereby several of the passengers

(1) [1919] 2 K. B. 316. (2) [1901] 2 K. B. 669.
(3) 1922 S. C. 527, 532.

C. A. 1924

HAMBROOK v. STOKES BROS.

were injured, but she herself was not touched. Lord Hunter in giving judgment said: "The sight of an occurrence like that may perfectly well unnerve a person in the delicate condition in which the pursuer was. At the same time, a shock occasioned by a sight of that sort, where there was no real fear of injury to the pursuer herself, would not, in my opinion, be a good ground of action against the defenders." That expression of opinion was no doubt obiter, for the pursuer did not found upon that occurrence as giving her a cause of action at all, but so far as it goes it supports the view of Kennedy J. The other judges did not refer to the point. In *Smith* v. *Johnson & Co.* (1), referred to by Wright J. in *Wilkinson* v. *Downton* (2), where a man was killed in the sight of the plaintiff by the negligence of the defendant, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, the Divisional Court held that the illness was too remote a consequence of the negligence. Wright J. apparently distinguished that case from *Wilkinson* v. *Downton* (2) on the ground that in the latter case there was an element of wilful wrong, which in law amounted to malice, which was absent in the former. *Janvier* v. *Sweeney* (3) may also be distinguished from the present case upon the same ground.

Cur. adv. vult.

Nov. 12. The following written judgments were delivered :—

BANKES L.J. This appeal raises an important and interesting point of law. The appellant, who was plaintiff in the Court below, claimed compensation under Lord Campbell's Act for the loss of his wife. His case was that his wife died as the result of nervous shock caused by the negligence of the respondents' servant. The material facts proved or admitted at the trial were that the defendants were the owners of a motor lorry, which was left by their servant unattended and with the engine running, and which ran away down a street in Folkestone, so narrow that in places the road was only just six feet wide. It was admitted that the defendants' servant

(1) Unreported. (2) [1897] 2 Q. B. 57, 61.
(3) [1919] 2 K. B. 316.

was negligent in allowing this to happen. The lorry was finally pulled up by running into a house close to where the appellant's wife happened to be standing. The appellant's case was that his children, at the time the lorry came down the street, were on their way to school, and having regard to the time at which they started, would presumably be where the lorry might strike them, the street being so narrow and the lorry swaying from side to side of the street. He further contended that the shock to his wife was due either to a reasonable fear of immediate personal injury to herself, or alternatively, of injury to her children, and that her death was the result of the shock. The case for the defendants was that the shock was due to a fear of injury to her children, which did not give rise to any cause of action, and further, that the wife's death was due to quite independent causes. Upon both points issues of fact were raised which were entirely for the jury, and upon which no question arises in this appeal.

The matter comes before this Court upon a complaint of misdirection by the learned judge, upon two matters. The first has reference to the way in which the learned judge put the case to the jury upon the question whether the wife's death was the result of the shock, or of some independent cause. I should not be prepared to direct a new trial upon this part of the case, as although the learned judge did, in summing up his address to the jury on this part of the case, put the matter in a way of which complaint can be made, he had previously put the matter so very clearly and carefully to the jury that I do not think they could have been in any way misled. The important part of the appellant's complaint is with regard to the statement of the law by the learned judge to the jury, in reference to the defendants' liability for any nervous shock caused to the wife. What the learned judge told the jury in substance was that if they found that the shock to the wife resulted in her death and arose from reasonable fear of immediate injury to herself, they might award the husband compensation, but that if they found that the fear was fear, not of injury to herself, but of injury to her children, they must find for the defendants.

C. A. 1924

HAMBROOK v. STOKES BROS.

Bankes L.J.

In thus directing the jury the learned judge was following the latest decision upon the point, and the object of this appeal is to get that decision, if decision it be, as opposed to a mere dictum, set aside or corrected, and the law laid down in terms wide enough to embrace either view of the cause of the shock to the wife.

The branch of the law relating to the responsibility for causing nervous shock has developed considerably in comparatively recent years. In *Lynch* v. *Knight* (1), decided in 1861, Lord Wensleydale speaks of mental pain or anxiety as something which the law cannot value and does not pretend to redress. In 1888, in the case in the Privy Council of the *Victorian Railways Commissioners* v. *Coultas* (2), the question was directly raised whether damages were recoverable for a nervous shock or mental injury caused by fright of an impending collision. The decision was that they could not, and the ground of the decision was that such damages would be too remote. Sir R. Couch, in delivering judgment (3), says this : " According to the evidence of the female plaintiff her fright was caused by seeing the train approaching and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims." The law thus laid

(1) (1861) 9 H. L. C. 577, 590. (2) 13 App. Cas. 222.
(3) Ibid. 225.

down was not followed in Ireland. In 1890, in the case of *Bell* v. *Great Northern Ry. Co. of Ireland* (1), a Court consisting of Palles C.B., Andrews and Murphy JJ., refused to follow that decision and accepted an earlier decision of the Court of Appeal in Ireland in an unreported case of *Byrne* v. *Great Southern and Western Ry. Co.*, in which the exact opposite was held to be the law The question does not appear to have been directly raised in England until 1901, when the case of *Dulieu* v. *White & Sons* (2) came before a Divisional Court consisting of Kennedy and Phillimore JJ. The facts in that case were that the plaintiff was claiming damages for illness caused by the shock resulting from the negligence of the defendants' servant in driving a pair-horse van into the house in which she was. The defendants contended that the statement of claim disclosed no cause of action. The Court refused to follow the Privy Council decision, and in elaborate and closely reasoned judgments both learned judges held that the plaintiff had disclosed a cause of action. In giving judgment, Kennedy J. (3) says this : " It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C." In introducing this limitation the learned judge relies upon a reference by Wright J. in the case of *Wilkinson* v. *Downton* (4) to a previous decision in the unreported case of *Smith* v. *Johnson & Co.*, in which a Divisional Court had held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock for fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. It must be noticed that the facts in this last mentioned case, and in the

(1) 26 L. R. Ir. 428.
(2) [1901] 2 K. B. 669.
(3) [1901] 2 K. B. 675, 682.
(4) [1897] 2 Q. B. 57, 61.

C. A. 1924

HAMBROOK v. STOKES BROS.

Bankes L.J.

general illustration given by Kennedy J. in support of his dictum, are very different from the facts of the present case. It may well be that the duty of a person to take care does not extend to a person in the position of the plaintiff in *Smith* v. *Johnson & Co.*, or to the person indicated as B. in Kennedy J.'s illustration, and yet may extend to a person in the position of the plaintiff's wife. I think that the decision in *Dulieu* v. *White & Sons* (1), apart from the exception introduced by Kennedy J., is now accepted as good law. It is certainly so treated by Lord Shaw in *Coyle* v. *Watson.* (2) The surest way, as it seems to me, of testing the question whether the limitation introduced by Kennedy J. upon the general rule is good law, is by considering the principle upon which the rule itself is based. Phillimore J. in his judgment in *Dulieu* v. *White & Sons* (1) approaches the question from that point of view. He commences his judgment with these words: "I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case if A. does inflict such a shock upon B.—as by terrifying B.—and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind." I had occasion, in the case of *In re Polemis and Furness, Withy & Co.* (3), to refer to the authorities and to the speech of Lord Sumner in *Weld-Blundell* v. *Stephens* (4) upon the question of the materiality of what a reasonable man ought to have anticipated when that man's negligence was in question. Lord Wensleydale, in *Lynch* v. *Knight* (5), approved of the reasoning of Christian J. in considering whether the plaintiff in that case had established a cause of action. He says: "I strongly incline to agree with him, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated

(1) [1901] 2 K. B. 669.
(2) [1915] A. C. 13.
(3) [1921] 3 K. B. 560.
(4) [1920] A. C. 956, 983, 984.
(5) 9 H. L. C. 577, 600.

and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow."

Accepting the line of reasoning illustrated by these authorities, it follows that what a man ought to have anticipated is material when considering the extent of his duty. Upon the authorities as they stand, the defendant ought to have anticipated that if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health. Can any real distinction be drawn from the point of view of what the defendant ought to have anticipated and what, therefore, his duty was, between that case and the case of a woman whose fear is for her child, and not for herself? Take a case in point as a test. Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognize a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not. In my opinion the step which the Court is asked to take, under the circumstances of the present case, necessarily follows from an acceptance of the decision in *Dulieu* v. *White & Sons* (1), and I think that the dictum of Kennedy J., laid down in quite general terms in that case, cannot be accepted as good law applicable in every case.

While coming to this conclusion, for the reasons I have given,

(1) [1901] 2 K. B. 669.

C. A. 1924

HAMBROOK v. STOKES BROS.

Bankes L.J.

I wish to confine my decision to cases where the facts are indistinguishable in principle from the facts of the present case, and in the present case I am merely deciding that in my opinion the plaintiff would establish a cause of action if he proved to the satisfaction of the jury all the material facts on which he relies—namely, that the death of his wife resulted from the shock occasioned by the running away of the lorry, that the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses, and not from something which some one told her, and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children. The judgment for the defendants must be set aside and a new trial ordered, the costs of the appeal to be paid by the defendants and the costs of the first trial to abide the event of the new trial.

ATKIN L.J. This action, so far as is relevant to our present decision, was brought under the Fatal Accidents Act, 1846, as amended by the Act of 1864, by a husband to recover damages for the death of his wife, alleged to be caused by the negligence of the defendants. The plaintiff, therefore, has to show that the death of his wife was caused by the wrongful act, neglect or default, of the defendants, and that the act, neglect or default, is such as would, if death had not ensued, have entitled the wife to maintain an action and recover damages in respect thereof. The negligence alleged by the statement of claim is that the defendants, by their servant, brought the defendants' motor lorry to rest at the top of a steep street in Folkestone, with the engine running, and omitted to take proper precautions to prevent it moving, whereby the plaintiff's wife, Mrs. Hambrook, was injured. It is very material to notice that by the defence the negligence is admitted, and the only material traverse raised is that the injury to the wife was caused by the negligence. The injury alleged arose under unusual circumstances. The evidence on behalf of the plaintiff was to the effect that on the morning in question, May 1, 1923, Mrs. Hambrook had escorted her children, two boys and a girl Mabel aged ten, to the pavement

in Dover Street, where they joined other children on their way to school. The group of children proceeded on their way, turning a corner of Dover Street within a few yards of leaving Mrs. Hambrook and so passing out of her sight. They had hardly turned the corner when the derelict motor lorry coming down the street, ricochetting from one side of the road to the other, dashed into the children, inflicting serious injuries to the child Mabel. The progress of the lorry would be heard by those round the corner, including Mrs. Hambrook. After injuring the child, it shot round the corner, and finally came to a stop within fifteen or twenty feet of Mrs. Hambrook. She immediately evinced signs of great mental disturbance, caused, as the jury have found, by apprehension, not of injury to herself, but of injury to the child. She was pregnant at the time; as to the stage of the pregnancy there is some discrepancy between the evidence of the husband, who says three months, and the doctor who attended her at her death on July 16, 1923, who says that on May 1 she had been pregnant two to six weeks; she had a severe hæmorrhage on May 3, which she thought was a miscarriage. She partially recovered, but about June 28 became worse, and died on July 16, 1923. On July 11 she was operated on and a fœtus removed, which the doctor said had been dead, "say a month, and about two or three months' development." An issue was raised by the defendants as to whether the death of the fœtus and the death of the mother were not entirely due to one or other of two drives in a motor charabanc which the wife had taken to the Derby on June 6 and to Ascot on June 21. It is sufficient to say that there was ample evidence upon which the jury might have found that death was not solely so caused. The learned judge directed the jury that unless the death of the wife was the result of shock produced by fear of harm to herself, as contrasted with shock produced by fear of harm to her child, the plaintiff could not recover. The question for us is whether that is a misdirection. In my opinion it was; and in consequence there must be a new trial.

The legal effects of injury by shock have undoubtedly developed in the last thirty or forty years. At one time the

C. A. 1924

HAMBROOK v. STOKES BROS.

Atkin L.J.

theory was held that damage at law could not be proved in respect of personal injuries, unless there was some injury which was variously called " bodily " or " physical," but which necessarily excluded an injury which was only " mental." There can be no doubt at the present day that this theory is wrong. It is perhaps irrelevant to discuss at length how it arose. It may be due partly to a false analogy between the action of negligence and the action of trespass to the person involving some sort of impact with the person ; and in part to the law following a belated psychology which falsely removed mental phenomena from the world of physical phenomena. The final expression of the theory in question is to be found in *Victorian Railways Commissioners* v. *Coultas*. (1) That case has been criticized in the Courts of England, Scotland and Ireland, and pronounced by Lord Shaw to be no longer a decision of binding authority. On the other hand there is a series of cases in which, in varying forms of action, injury from shock has been held to entitle the person so injured to recover damages. I will confine myself to the English cases. In the case of *Pugh* v. *London, Brighton and South Coast Ry. Co.* (2), in 1896, a signalman was held to have been incapacitated from employment by reason of accident, where the incapacity was due to shock caused by the excitement and alarm of successfully averting an accident to a train. There was no apprehension of danger to the signalman, and the members of the Court seem to have considered that the fright was the accident, and the shock and consequent incapacity the result of the accident. In *Smith* v. *Johnson & Co.* (3), referred to by Wright J. in his judgment in *Wilkinson* v. *Downton* (4), a Divisional Court consisting of Bruce and Wright JJ. decided that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill from the shock of seeing the man killed, the damage was too remote a consequence of negligence. No further particulars are available ; the case was presumably a county court case, and it does not appear what facts had been found. The

(1) 13 App. Cas. 222.
(2) [1896] 2 Q. B. 248.
(3) Unreported.
(4) [1897] 2 Q. B. 57.

decision of the Court, according to Wright J., was based on the remoteness of damage. In the case of *Wilkinson* v. *Downton* (1) the defendant in joke had falsely represented to a married woman that her husband had met with a serious accident whereby both his legs were broken. The plaintiff suffered a serious shock. Wright J. held that she was entitled to recover damages. Here the apprehension was of injury to the husband; there was no intent to injure, but there was an intent that the wife should believe the representation; and the representation was found either by the judge or the jury to be calculated to cause physical harm. In *Dulieu* v. *White & Sons* (2) damages for shock caused by apprehension of injury to the plaintiff by negligent driving were held to be recoverable. The case was decided by Kennedy and Phillimore JJ. on a point of law raised in the pleadings. The decision is plainly right. The case is important for the dictum of Kennedy J. which Branson J. followed in the present case, to the effect that the shock where it operates through the mind must be a shock which arises from reasonable fear of immediate personal injury to oneself. I will discuss the correctness of this dictum later. I do not see that Phillimore J. expressed any definite opinion upon this point. Finally, in *Janvier* v. *Sweeney* (3), a private detective made false representations in the nature of threats to a female servant, in order to obtain information from her. The representation found by the jury was: "You are the woman we want, as you have been corresponding with a German spy." The alleged German spy was a man named Neumann, who was then interned, to whom the plaintiff had been engaged for five years. The Court of Appeal held that the plaintiff was entitled to recover damages for injury caused by shock, the result of the representations. The jury had found that the statements were calculated to cause physical injury, and were made by the defendant with the knowledge that they were likely to cause injury. It does not clearly appear whether the fright of the plaintiff was of evil consequences to herself,

(1) [1897] 2 Q. B. 57. (2) [1901] 2 K. B. 669.
(3) [1919] 2 K. B. 316.

C. A. 1924

HAMBROOK v. STOKES BROS.

Atkin L.J.

or to Neumann, but it may be that the Court of Appeal accepted the former view.

In this state of the authorities, was the direction of the learned judge right? It appears to me that if the plaintiff can prove that her injury was the direct result of a wrongful act or omission by the defendant, she can recover, whether the wrong is a malicious and wilful act, is a negligent act, or is merely a failure to keep a dangerous thing in control, as for instance a failure to keep a wild beast in control. Once a breach of duty to the plaintiff is established, one has no longer to consider whether the consequences could reasonably be anticipated by the wrongdoer. The question is whether the consequences causing damage are the direct result of the wrongful act or omission. The full effect of the decision in *In re Polemis and Furness, Withy & Co.* (1) has not yet, I think, been fully realized, even though that case laid down no new law. I agree that in the present case the plaintiff must show a breach of duty to her, but this she shows by the negligence of the defendants in the care of their lorry. I am clearly of opinion that the breach of duty to her is admitted in the pleadings. I do not appreciate the nature of the admission, unless it is an admission of negligence which, if supported by damage, would give the plaintiff a cause of action. This seems made plain by the fact that the only traverse in the defence is that the negligence caused damage, and by the, to me, conclusive fact that the same admission of negligence covers the cause of action of the infant plaintiff to whom the duty is not in dispute.

But apart from the admission in the pleadings, I think that the cause of action is complete. The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the highway. If so, he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway. It is thus a duty owed to all wayfarers, whether they are injured or not; though damage by reason of the breach of duty is essential before any wayfarer can sue. Further, the breach of duty

(1) [1921] 3 K. B. 560.

does not take place necessarily when the vehicle strikes or injures the wayfarer. The negligent act or omission may precede the act of injury. In this case it was completed at the top of Dover Street, when the car was left unattended in such a condition that it would run violently down the steep place. Here, then, was a breach of a duty owed to Mrs. Hambrook. No doubt the particular injury was not contemplated by the defendants, but it is plain from *In re Polemis and Furness, Withy & Co.* (1) that this is immaterial. If the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect, is immaterial, so long as the damage in in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act: per Scrutton L.J. as p. 577. I can find no principle to support the self-imposed restriction stated in the judgment of Kennedy J. in *Dulieu* v. *White & Sons* (2), that the shock must be a shock which arises from a reasonable fear of immediate personal injury to oneself. It appears to me inconsistent with the decision in *Pugh* v. *London, Brighton and South Coast Ry. Co.* (3), and with the decision in *Wilkinson* v. *Downton* (4), in neither of which cases was the shock the result of the apprehension of the injury to the plaintiff. It would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not, and in which a mother traversing the highway with a child in her arms could recover if shocked by fright for herself, while if she could be cross-examined into an admission that the fright was really for her child, she could not. In my opinion such distinctions would be discreditable to any system of jurisprudence in which they formed part. Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party. There may well be cases where the sight of suffering will directly and immediately

(1) [1921] 3 K. B. 560.
(2) [1901] 2 K. B. 669.
(3) [1896] 2 Q. B. 248.
(4) [1897] 2 Q. B. 57.

C. A. 1924

HAMBROOK v. STOKES BROS.

Atkin L.J.

physically shock the most indurate heart; and if the suffering of another be the result of an act wrongful to the spectator, I do not see why the wrongdoer should escape. The reason why a threatened battery upon the plaintiff is actionable if it causes damage, is that it is an assault, a crime committed against the plaintiff, and therefore a wrong to him. The reason why a threatened or an actual battery against a third person is not actionable by a spectator is that it is not a wrong to him. It may be that to negative Kennedy J.'s restriction is to increase possible actions. I think this may be exaggerated. I find only about half-a-dozen cases of direct shock reported in about thirty years, and I do not expect that shocks to bystanders will outnumber them. But if they do, in the words of Kennedy J. (1), "I should be sorry to adopt a rule"—in this case the restriction—"which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."

In my opinion it is not necessary to treat this cause of action as based upon a duty to take reasonable care to avoid administering a shock to wayfarers. The cause of action, as I have said, appears to be created by breach of the ordinary duty to take reasonable care to avoid inflicting personal injuries, followed by damage, even though the type of damage may be unexpected—namely, shock. The question appears to be as to the extent of the duty, and not as to remoteness of damage. If it were necessary, however, I should accept the view that the duty extended to the duty to take care to avoid threatening personal injury to a child in such circumstances as to cause damage by shock to a parent or guardian then present, and that the duty was owed to the parent or guardian; but I confess that upon this view of the case I should find it difficult to explain why the duty was confined to the case of parent or guardian and child, and did not extend to other relations of

(1) [1901] 2 K. B. 681.

life also involving intimate associations; and why it did not eventually extend to bystanders. It may be, however, that there is not any practical difference between the two ways of putting it; for the degree of care to be exercised by the owner of the vehicle would still in practice be measured by the standard of care necessary to avoid the ordinary form of personal injuries. One may, therefore, conclude by saying that this decision in no way increases the burden of care to be taken by the drivers of vehicles, and that the risk foreshadowed in one of the cases, of an otherwise careful driver being made responsible for frightening an old lady at Charing Cross, is non-existent.

The case must go for a new trial. I need, therefore, not pronounce finally upon the complaint of misdirection as to the cause of the injury, though I incline to think that it might have misled the jury, and be in itself a sufficient ground for the order we now make. No doubt at the trial all the facts will be carefully investigated, including the possibility that the shock received by the mother was in no way caused by the sight or sound of the accident and apprehension of danger to the child or children, but solely to the report of the injury to the daughter, made to her by the third person. I content myself with saying that there is evidence that the latter is not the true view.

SARGANT L.J. This appeal arises in regard to a claim by the plaintiff under Lord Campbell's Act for the death of his wife in consequence of a motor lorry of the defendants escaping from control and charging down Dover Street, Folkestone. The plaintiff, to establish his claim, has to show that his wife, had she not died, would have been entitled to recover from the defendants for injury inflicted on her. Mrs. Hambrook having died, it is not possible to ascertain the precise circumstances of the accident. But it is clear that just previously she had, in accordance with her usual custom, taken her children—two boys and a girl—across Dover Street on their way to school, and that they had gone some few yards up the street and out of her sight past a bend. The lorry

C. A. 1924

HAMBROOK v. STOKES BROS.

Sargant L.J.

had then charged down this higher part of the street, bumped into the shop of a dealer Brown, on the opposite side of the street to that on which the children had been walking—apparently in company with, or near to, other children—and then crossed the street, passed the bend above Mrs. Hambrook, and finally brought up against a baker's shop on her side of the street not far from her. She was then found in a frantic condition, in violent hysterics, tearing her hair and inquiring wildly as to the safety of her little girl. Her state was no doubt due to shock arising from one or other aspect of the accident; but the evidence given did not indicate with absolute certainty whether the shock was due (1.) to apprehension of immediate injury to herself from the lorry, though her exclamations seem to negative this view, or (2.) from apprehension of injury having been caused by the lorry to one or other of her children. And, on the latter hypothesis, it is not quite clear whether the apprehension of this danger was solely due to the realization that the lorry had been charging down the street in which her children were, or was due to, or aggravated by, statements made to her that a little girl wearing spectacles (as her girl did) had been injured. There seems to be strong ground for the latter view, inasmuch as she appears to have expressed apprehension for the girl only, though the two boys had been in equal peril, and one of them was the youngest of the three and therefore the least capable of taking care of himself. In fact, the little girl had been seriously though not dangerously injured; and after Mrs. Hambrook had somewhat recovered from her hysterics, she was taken by her husband to the school, and from there to the hospital, whither the little girl had been conveyed. But Serjeant Sullivan, in his able argument before us, expressly disclaimed any suggestion that the shock to Mrs. Hambrook, which is said to have been the cause of her subsequent death, was due to or aggravated by her finding that the little girl was missing from the school, or by her afterwards tracing her to and seeing her in the hospital. He relied upon the shock occasioned to Mrs. Hambrook by the original apprehension of the imminent danger to her little girl, or

rather perhaps of the imminent danger to her three children; for, apart from the information said to have been given by a bystander, there was no more reason for apprehending danger to the girl than to either of the boys.

On these facts Branson J. directed the jury, as a matter of law, that the plaintiff had to show, as a first step, that the shock causing Mrs. Hambrook's illness arose from a reasonable fear of immediate personal injury to herself. The appellant says that this is a misdirection, and that it would be sufficient for his case on this point if the shock arose from fear or apprehension of personal injury to her children. It is admitted that the learned judge's direction followed precisely the view expressed by Kennedy J. in *Dulieu* v. *White & Sons*. (1) But it is said that the view so expressed was not necessary to the decision of that case, and was wrong, and should be overruled. *Dulieu* v. *White & Sons* (1) seems to have been the first case in the High Court of accident on or near the highway in which the defendant was rendered liable for negligence without there having been direct physical injury to the plaintiff, either by actual impact of the vehicle or in the course of the accident. And it is a notable case, as having adopted the reasoning of the Court of Appeal in Ireland in *Bell* v. *Great Northern Ry. Co. of Ireland* (2) and rejected the express decision of the Privy Council in *Victorian Railways Commissioners* v. *Coultas*. (3) But, apart from the importance due to the necessity of having to decide between two directly conflicting decisions, I do not think that *Dulieu* v. *White* (1) marked any great advance in the development of our law, or any considerable extension in the liabilities of users of the highway for negligence. It is no doubt more difficult to prove that physical injury results from nervous shock than from direct impact. But when once this difficulty of proof is overcome, I cannot see why a negligence which so nearly causes direct impact as to cause physical injury by nervous shock is a more remote or less natural cause of damage than a negligence causing actual physical impact. Or, to put it more precisely,

(1) [1901] 2 K. B. 669. (2) 26 L. R. Ir. 428.
(3) 13 App. Cas. 222.

C. A. 1924

HAMBROOK v. STOKES BROS.

Sargant L.J.

as a matter of duty which is owed to the plaintiff, and the neglect of which has caused damage, the duty of the defendant so to control his vehicle as to avoid causing physical injury to those on or near the highway, including the plaintiff, can hardly be limited to actual physical impact on the plaintiff (though this is in fact the result of the American cases), but must logically include such an immediate threat of impact on the plaintiff as to produce physical injury to him, or her, through the nervous system. There seems to me to be no magic in actual personal contact. A threatened contact producing physical results should be an equivalent. The principle on which a threatened battery may justify damages for assault is in my view strictly analogous. In the case of a threat of imminent danger to a plaintiff resulting in illness through nervous shock, there is, in my view, as real and direct an interference with the personality of the plaintiff as if the illness had been caused by actual physical contact with him. And the duty of a defendant to avoid acts or omissions which will result in the illness of the plaintiff seems to me as clear and definite in the one case as in the other, though no doubt the occasions on which illness will result are much less frequent in the first case than in the second.

On the other hand, the matter is very different when the shock to the plaintiff is due not to immediate fear of personal impact, but to the sight or apprehension of impact on a third person. Here the case of *Smith* v. *Johnson & Co.* (1), referred to by Wright J. in his judgment in *Wilkinson* v. *Downton* (2), is of the highest importance. There the plaintiff became ill, not from impact on himself, nor from fear of such impact, but from the shock of seeing another killed, the death being due to the negligence of the defendant. And it was held that the plaintiff was not entitled to recover. That decision seems to me unquestionably right, though I should prefer, with Kennedy J., to put it not on the ground that the harm was too remote a consequence of the negligence, but on (what is often practically equivalent) a consideration of the extent of the duty of the defendant towards the plaintiff and others on and

(1) Unreported. (2) [1897] 2 Q. B. 57, 61.

near the highway. That is to say that, as the defendant did not do anything which could reasonably or naturally be expected to cause the harm in question to the plaintiff, there was no evidence of any breach of duty towards him for which the defendant could be rendered liable. In my judgment, it would be a considerable and unwarranted extension of the duty of owners of vehicles towards others in or near the highway, if it were held to include an obligation not to do anything to render them liable to harm through nervous shock caused by the sight or apprehension of damage to third persons.

No doubt in the case of *Smith* v. *Johnson & Co.* (1) the person killed was a stranger to the plaintiff, while here the persons with regard to whom apprehension was entertained were the young children of Mrs. Hambrook herself. But I cannot think that this makes any real difference, if the question is regarded, as I think it ought to be regarded, from the point of view of the extent of the duty of the defendant towards the public in or near the highway. If he has no duty to avoid shocking them by killing or endangering strangers, can it be reasonably held that he has such a duty to avoid shocking them by killing or endangering their friends or relatives? And, if so, what degree of friendship or relationship is the defendant to expect as that which will reasonably or naturally result in harmful nervous shock? It seems to me that, when once the requirement is relaxed, that the shock is to be one caused by the plaintiff's apprehension of damage to himself, the defendant is exposed to liability for a consequence which is only reached by a new and quite unusual link in the chain of causation, and which cannot therefore properly be held to have been within his ordinary and reasonable expectation. And the extent of this extra liability is necessarily both wide and indefinite, inasmuch as it may vary with the precise degree of connection between the person injured and the plaintiff, and also, perhaps, with the circumstances attending the realization by the plaintiff of actual or apprehended injury to the third person. For instance, should

(1) Unreported.

C. A. 1924

HAMBROOK v. STOKES BROS.

Sargant L.J.

it extend to a shock occasioned to a daughter by apprehended danger to a mother, or to a sister by apprehended danger to a brother? And where, as in this case, the apprehended danger is out of the sight of the plaintiff, ought the plaintiff to be entitled to recover for the illness by shock, if the facts were that the person whose safety was in question had turned off the dangerous highway, or had for some other reason never been in imminent danger at all?

Some stress was laid, in the argument for the appellant, on the anomalies that might arise if in such a case as this a mother had been hand in hand with her child, and were entitled or disentitled to recover according as her shock was due to her own personal danger or to her child's. In my judgment, no assistance is rendered by the consideration of possible cases which are rendered more complicated than the present by the concurrence or confusion of two possible causes of apprehension and shock. Here there is, as the evidence has been given, little risk of any such confusion, since there is no evidence that Mrs. Hambrook was, or considered herself to be, in any personal danger, and the inference which Serjeant Sullivan asked the Court to draw was that the shock was due to Mrs. Hambrook's acute apprehension of the danger to one or more of her children.

The cases of *Wilkinson* v. *Downton* (1) and *Janvier* v. *Sweeney* (2) are not really in point, since they are founded on intentional and malicious wrongdoing. *Pugh* v. *London, Brighton and South Coast Ry. Co.* (3) is merely a decision on what amounted to an accident within the meaning of a policy. And *In re Polemis and Furness, Withy & Co.* (4) dealt with a case in which there was a duty by contract between the plaintiff and the defendant, while here we have to determine, in the absence of contract, what is the extent of the duty of the defendant, and whether the plaintiff's wife fell within the area of the duty as so defined. I do not think that any of these cases assist the solution of the present problem.

A second alleged misdirection by the learned judge may be

(1) [1897] 2 Q. B. 57.
(2) [1919] 2 K. B. 316.
(3) [1896] 2 Q. B. 248.
(4) [1921] 3 K. B. 560.

much more briefly dealt with. It is said that, in charging the jury as to the sufficiency of the chain of causation connecting the original illness of Mrs. Hambrook with her ultimate death, the learned judge made an important mistake of fact and took a view of the law towards the end of his charge, which was too unfavourable to the plaintiff. If this alleged second misdirection stood alone, I should have felt some difficulty; but, as it is, this second point becomes unimportant on either alternative view of the first point. For on the view of the majority of the Court as to the first point, a new trial has to be granted. And, on my view of the first point, the plaintiff could not succeed unless there were apprehension by his wife of personal injury to herself, and there was no evidence before the jury on which they could properly find that any such apprehension of injury to herself was the cause of her illness by shock. Indeed I read their verdict as negativing this view.

In my opinion, the appeal should be dismissed, but in view of the fact that the majority of the Court are of opinion that it should be allowed, I would suggest the advisability of the judge directing the jury on the new trial to find whether the shock to Mrs. Hambrook was caused by her own unaided realization of what had happened, or was due wholly or partly to what she heard from bystanders. For I gather that the view of the majority of the Court is that it is only in the former event that the defendants would be liable; and, as I have already said, the fact that Mrs. Hambrook appears to have expressed anxiety only as regards her daughter, is an indication of some weight that she had heard from others of the injury to a little girl answering in one respect the description of her daughter.

Appeal allowed.

Solicitors for the appellant: *Edmund O'Connor & Co.*
Solicitors for the respondents: *William Hurd & Son.*

J. F. C.

1924
Oct. 22, 23;
Nov. 14.

W. H. MULLER AND COMPANY'S ALGEMEENE SCHEEPVAARTMAATSCHAPPIJ *v.* CORPORATION OF TRINITY HOUSE OF DEPTFORD STROND.

[1924. W. 1266.]

Shipping—Pilot—Compulsory Pilotage—Ship navigating in Compulsory Pilotage District—Reasonable Steps to obtain a licensed Pilot—Pilotage Dues—Shipowners' Liability—Pilotage Act, 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *ss.* 11, 17, 55, 59.

By the Pilotage Act, 1913, s. 11, sub-s. 1: "Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either: (*a*) under the pilotage of a licensed pilot of the district; or (*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship":—

Held, on the construction of this sub-section, that navigation without a pilot in a compulsory pilotage area is not absolutely forbidden, but that the ship is under a continuing obligation to fly the pilot flag and to take a pilot on board if he offers. If no pilot offers there is no liability upon the owner to pay pilotage dues.

By s. 17, sub-s. 1, of the same Act, "A pilotage authority may by by-laws made under this Act . . . . (*f*) fix for the district the rates of payment to be made in respect of the services of a licensed pilot (in this Act referred to as pilotage dues)."

Held, that the word "services" in this section means "services rendered," and that a pilotage authority cannot make a by-law imposing a liability on ship-owners to pay pilotage dues other than for such services.

ACTION in the Commercial List before Rowlatt J.

The plaintiffs were a Dutch company and owners of the Batavier line of steamships. By this line they maintained a service between Rotterdam and London of five sailings each way per week carrying passengers and cargo. According to the points of claim, the direct route for steamships from Rotterdam to London was to pass near the Tongue Light Vessel, and before 1919 the masters of the plaintiffs' steamships, who were Dutch subjects, held pilotage certificates

authorizing them to pilot their vessels between the Tongue Light Vessel and Gravesend, where the passengers were disembarked. The plaintiffs alleged that during the war this route was closed, but was afterwards reopened. By the Aliens Restriction Act, 1919, s. 4, aliens were precluded from holding pilotage certificates for any pilotage district in the United Kingdom, and the plaintiffs' steamships became subject to the provisions relating to compulsory pilotage in the London district.

The defendants, who were the Pilotage Authority for the London Pilotage District, had a pilot cutter stationed near the Sunk Light Vessel, and maintained on board the cutter a supply of pilots licensed to pilot vessels inward bound to the Thames. The plaintiffs alleged that their steamships bound from Rotterdam to London could not obtain a pilot from the cutter unless they deviated from the route via the Tongue Light Vessel, and that this deviation caused loss and difficulty to them on their business, the route from the Hook of Holland to the Nore via Sunk Light Vessel being longer and less favourable. In March, 1922, the defendants, in answer to a request by the plaintiffs, refused to station pilots near the Tongue Light Vessel, and the plaintiffs then instructed their masters to navigate by that vessel and not by the Sunk Light Vessel, to hoist the signal for a pilot immediately their vessels entered the London Pilotage District, and to keep the signals flying until a licensed pilot offered his services, when those services were to be accepted. These instructions were carried out by the masters of the plaintiffs' steamships. According to the points of claim, licensed pilots had in fact offered their services near the Tongue Light Vessel, which had always been accepted by the plaintiff's steamships from thence to Gravesend.

On April 4, 1922, the following by-law existed for the London Pilotage District, confirmed in accordance with the Pilotage Act, 1913: "A ship subject to compulsory pilotage which is bound from any port or place outside the compulsory limits of the London District shall pay the full rate of pilotage, unless it is proved to the satisfaction of the Trinity House that she

1924

W. H. MULLER & CO. v. TRINITY HOUSE (DEPTFORD STROND).

was unable to obtain a pilot from the proper pilot station on account of the pilot being off station or other special causes."

On June 8, 1922, the following by-law was substituted therefor: "A ship which enters the London Pilotage District and is subject to compulsory pilotage shall take a pilot at the proper pilot station, and unless unable to obtain one for reasons acceptable to the Trinity House, shall pay the full pilotage rate and shipping charge."

There existed in April, 1922, another by-law for the London Pilotage District purporting to be made under the Pilotage Act, 1913, which was as follows: "The following charges are payable in respect of ships subject to compulsory pilotage bound to any port or place within the London Pilotage District, and also in respect of any other ship supplied with a pilot." [Here followed a list of charges.]

On June 8, 1922, the following by-law was substituted therefor: "The following shipping charges are payable in respect of any ship (sail or steam) subject to compulsory pilotage bound to any port or place within the London Pilotage District and also in respect of any other ship supplied with a pilot."

The pilotage rate specified in the by-laws for the stage between the Tongue Light Vessel and Gravesend was lower than that specified for the stage between the Sunk Light Vessel and Gravesend. The plaintiffs had rendered accounts to the defendants for pilotage on the basis that when a pilot was taken at the Tongue Light Vessel, the pilotage rate was the rate for the stage between that vessel and Gravesend, together with shipping money, but alleged that when no pilot offered his services and no services were rendered they were not liable to pay pilotage dues or shipping money.

The defendants alleged that the proper basis for the account was that the full rate from the Sunk Light Vessel to Gravesend, together with shipping money, was chargeable both when a pilot was taken at the Tongue Light Vessel, and also on occasions when no pilot having offered his services no pilotage services had been rendered. There was no dispute between the parties as regards the outward pilotage.

1924

W. H. MULLER & Co. v. TRINITY HOUSE (DEPTFORD STROND).

The plaintiffs claimed judgment for 1351*l.*, which they alleged had been overpaid by them to the defendants owing to the difference between them as to the basis of account. They also claimed an account, and a declaration: (1.) that they were only liable to pay the pilotage rate from the Tongue Light Vessel to Gravesend when a pilot was taken from that vessel and not the rate from the Sunk Light Vessel, (2.) that when no pilot offered his services and no pilot was in consequence taken, they were not liable to pay pilotage dues or rates, (3.) that the above by-laws were ultra vires and void.

The defence, so far as material, was that by virtue of the Pilotage Act, 1913, and the Pilotage Orders and By-laws made thereunder, it was the duty of the plaintiffs to take all reasonable steps with a view to the embarkation of pilots on board the plaintiffs' vessels bound for London, and that such steps were to proceed via the Sunk Light Vessel route, where there was a pilot station, and not via the Tongue Light Vessel route. The defendants admitted that as an act of grace they had permitted pilots licensed for the South Channel to offer their services to the plaintiffs' vessels in the neighbourhood of the Tongue Light Vessel, and said that such service was effected by pilots proceeding from Margate in hired motor boats. They claimed that where the plaintiffs failed to embark pilots on board their vessels by reason of the omission to take the reasonable steps referred to, they were entitled to charge the full rate for pilotage (with shipping money) from the Sunk Light Vessel, at which point pilots ought to have been taken. The defendants counterclaimed a declaration that the above by-laws were intra vires, and that they were entitled to charge the rates and shipping charges provided for therein.

Dunlop K.C. and *E. A. Digby* for the plaintiffs. Where the services of a pilot are accepted by an inward ship from the Tongue Light Vessel the pilotage dues should be the rate charged for that stage and not the rate for the stage from the Sunk Light Vessel. The schedule to the defendants' by-laws made for the London Pilotage District confines pilotage dues to payment "for pilotage services rendered to

1924

W. H. MULLER & Co. v. TRINITY HOUSE (DEPTFORD STROND).

steamships," and the Pilotage Act, 1913, s. 55, sub-s. 1 (*a*), which deals with foreign ships, provides for payment as to inward ships of "the full amount of pilotage dues for the distance piloted." As regards payment, where no pilot is taken, there is no liability at common law at all, and such a duty if it rested on the owner would be entirely statutory. The Pilotage Act, 1913, s. 11, only provides for payment by the master of a fine in case of breach where pilotage is compulsory; it imposes neither fine nor any other liability on the owner. The Merchant Shipping Act, 1854, s. 354, and that of 1894, s. 604, which was the forerunner of the Pilotage Act, 1913, s. 11, merely impose on the master the obligation of accepting the offer of a pilot if made. There is no civil liability for dues, nor is there any suggestion here that the plaintiffs' servants committed an offence under the Pilotage Act, 1913. The pilot signal was displayed on all occasions and kept flying until a pilot offered his services.

The Pilotage Act, 1913, nowhere says that the master of a ship must take "all reasonable steps" to obtain a pilot: nor does it say that he must wait for a pilot before proceeding. Sects. 43 and 44 deal with the obligation to obtain a pilot, and the duty to take "reasonable steps" only appears in s. 30, sub-s. 4, in the case of an outward bound ship. The obligation is rather upon the pilot to offer his services, if he reasonably can (s. 48, sub-s. 1 (*g*)), and not upon the master to search for him. The liability to pay pilotage dues is only imposed (s. 49) where the services of a licensed pilot are obtained, and then only "for the distance piloted" (s. 55, sub-s. 1 (*a*)). No debt therefore exists except for actual service rendered.

As to the by-laws in question, they are void, as being repugnant to the Pilotage Act, 1913, ss. 11, 55. "A by-law is repugnant if it expressly or by necessary implication professes to alter the general law of the land": per Channell J. in *Gentel* v. *Rapps*. (1) The by-laws are not made valid by s. 16 of the Pilotage Act, 1913, because the pilotage authority is only to act "subject to the provisions of this Act." The question whether the by-laws are reasonable does not here arise.

(1) [1902] 1 K. B. 160, 166.

1924

W. H. MULLER & Co. v. TRINITY HOUSE (DEPTFORD STROND).

Bateson K.C. and *G. P. Langton* (*S. D. Cole* with them) for the defendants. By the Pilotage Act, 1913, s. 11, every ship navigating in a pilotage district, where pilotage is compulsory, must have a licensed pilot on board, and it follows that all reasonable steps must be taken to find a pilot—that is to say, the ship must go to the place where pilots are available. In default the shipowners must pay the pilotage dues and shipping moneys which would otherwise have been payable. This is necessary for the maintenance of the pilotage system. The charges made by the defendants are within their by-laws, which are valid under the Pilotage Act, 1913, s. 17, sub-s. 1 (*f*). The word "services" is used in that section as meaning "services available" and not merely "services rendered."

The powers of the Trinity House have existed from time immemorial. In the Pilotage Act, 1812 (52 Geo. 3, c. 39), s. 63, and the Pilotage Act, 1825 (6 Geo. 4, c. 125), s. 46, it was expressly provided that foreign ships coming into the Port of London should pay pilotage dues, even if no pilot were taken. Compulsion to pay and compulsion to take a pilot go together. By the Act of 1825, ss. 44–46, the rules as to pilotage rates were fixed, and those rules have never been altered. Those Acts were repealed, but the Merchant Shipping Act, 1894 (Part X.), still entrusts to the Trinity House the duty of carrying out the provisions of the Act, the object being to prevent persons from evading the obligation of pilotage. This power remains in the Trinity House under the Pilotage Act, 1913, and it has always been the custom to render these charges. Sect. 55 of that Act fixes the dues which are to be paid over by the Customs officer to the Trinity House, and s. 59 preserves any "customs" affecting pilotage which were in force at the time of the passing of the Act. This includes the custom of charging foreign owners, who have evaded pilotage, the full pilotage rate. The Pilotage Act, 1913, s. 43, provides that a pilot signal shall be displayed and the pilot taken on board. We do not contend that this liability exists where there is a reasonable excuse, but we are entitled to charge for "available services," and not only for "services rendered." The Pilotage Act, 1913, s. 11, sub-s. 2,

1924

W. H. MULLER & Co. v. TRINITY HOUSE (DEPTFORD STROND).

does not apply to this case. A debt exists whether the master takes a pilot or not, but if he continues the voyage without a pilot after offer made, he is also liable to a penalty. By s. 17, sub-s. 1 (*d*), the pilotage authority may make by-laws under the Act to determine the "system" to be adopted with regard to the supply of pilots to shipowners, and it was by virtue of that power that these by-laws were passed. The by-laws are therefore intra vires and valid.

Dunlop K.C. in reply. As regards the history of this legislation, the Pilotage Act, 1812 (52 Geo. 3, c. 39), s. 63, was repealed by the Act of 1825 (6 Geo. 4, c. 125), which re-enacted (s. 46) the provision that an inward ship must pay dues even if no pilot were on board. That again was repealed by the Merchant Shipping Repeal Act, 1854, and replaced by s. 381 of the Merchant Shipping Act of that year, corresponding to s. 55, sub-s. 1 (*a*), of the Pilotage Act, 1913. The defendants under the Act of 1913 have only the powers common to every pilotage authority. The special powers apparently given them in the Merchant Shipping Act, 1894 (Part X.), have not been repeated in the Pilotage Act, 1913. No "custom" in the defendants' favour, such as is preserved by the Act of 1913, s. 59, has here been proved, and if any existed it is superseded by the Pilotage Act, 1913, the Pilotage Order and the by-laws made under the Act, as approved by the Board of Trade: *Buck* v. *Tyrrel.* (1)

If the earlier Merchant Shipping Acts kept alive the power to charge dues where no pilot was employed, that power disappeared when the Merchant Shipping Act, 1894 (Part X.), so far as it affected the London Pilotage District, was repealed by the Pilotage Order (Confirmation) London Act, 1913, Schedule, cl. 8. The Pilotage Act, 1913, s. 17, sub-s. 1, only permits the authority (cl. (*f*)) to fix the rates of payment for services rendered and to define the conditions and scales of payment. The word "system" in s. 17, sub-s. 1 (*d*), refers only to matters of internal administration, such as a "turn" system or a system of "choice" pilotage. It does not refer to any system by which pilots are required to be taken on

(1) (1922) 10 Ll. L. R. 74.

board at particular points. As regards shipping moneys, according to the by-laws, these are "the rates levied for the maintenance and upkeep of pilot vessels specified in the Schedule," whereas "pilotage dues" are defined as "the rates of payment to be made in respect of the services of the pilots specified in the Schedule." No obligation to pay, where no pilot is shipped, exists in either case.

ROWLATT J. The entrances to the Thames are two, one being at the Tongue and the other at the Sunk, and the pilots which the defendants have provided under their statutory duty are divided into three classes: the Cinque Port pilots, who pilot ships coming up the Channel, and who get on board at Dungeness, or are distributed at different ports and board ships which are there by accident, or which are taking pilots at that point of their own freewill; and the Channel pilots, who pilot outward from Gravesend, but are also trained to pilot inwards. These two classes pilot via the Tongue Light Vessel, which is in the South Channel. The third class are the North Channel pilots, who pilot from the Sunk Light Vessel by the North Channel. The Sunk pilots cannot pilot via the Tongue nor the Tongue pilots via the Sunk Channel. The Batavier Line is a Dutch line, and under present law their masters and mates, not being British subjects, are not eligible as pilots, so that the ship is a ship without a pilot unless she takes one when she reaches the mouth of the Thames.

The main question here is whether when a ship enters the compulsory pilotage area and continues her passage through it to her destination without having taken a pilot, she can be charged with the pilotage dues as a debt, independently of the question whether any offence has been committed. The defendants contend that she can be so charged, and if that contention is wrong then the whole defence fails, and there is no longer any question as to what rate is chargeable. The question depends upon the Pilotage Act, 1913, and the most material section here is s. 11. That section provides (sub-s. 1) that "every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory

1924

W. H. MULLER & CO. v. TRINITY HOUSE (DEPTFORD STROND).

Rowlatt J.

. . . . shall be either (*a*) under the pilotage of a licensed pilot of the district : or (*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district," and (sub-s. 2) that "if any such ship is not under pilotage as required by this section after a licensed pilot has offered to take charge of the ship, the master of that ship shall be liable in respect of such offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship." The plaintiffs say that this section covers the whole of the ground, and that the liability being created by the statute and a penalty for breach being provided, there can be no debt. The defendants on the other hand say that sub-s. 2 only deals with the case where the pilot has offered, and that whether a pilot offers his services or not, a debt is incurred for pilotage dues in every case, as soon as an inward ship passes the limits with the intention of navigating to London, but that if in fact a pilot has offered, then a penalty is incurred in addition under s. 11, sub-s. 2. The question is therefore whether s. 11, sub-s. 1, creates a debt for pilotage dues. As to this I think the true construction is not that no vessel shall navigate unless she has a licensed pilot on board, but that she is under a continuing obligation to fly the pilot flag and must take a pilot on board if he offers.

To construe the sub-section otherwise would be unreasonable, and would place a great responsibility upon the pilotage authority, besides being in conflict with s. 30, which provides for the supersession of a pilot who is not authorized. Even if the position is that she must stop, it does not follow that if she does not stop she must pay the fees for pilotage, and I cannot see any connection between the two propositions. But the defendants say that even if she is not bound to stop she must take all reasonable steps to find a pilot, that is to say she must go to the place where she knows the pilots will be assembled, even though that point is at the Sunk, and not at the Tongue, which is the nearest from the nautical point of view. Even if this is true I am in the same difficulty as before, that if she fails to carry out this obligation, it does not seem to follow that she must pay the pilotage dues.

It was further argued that s. 17, sub-s. 1, enabled the pilotage authority to make by-laws upon various matters, for example (cl. (*d*)), to "determine the system to be adopted with respect to the supply and employment of pilots, and provide, so far as necessary, for the approval, licensing, and working of pilot boats in the district. . . " That means that they may determine by means of by-laws the system which is to govern the supply and employment of pilots as a matter of internal administration. There were, as has been pointed out, at the time of the passing of the Act of 1913, various pilotage systems in force all over the country, and the pilotage authority had to decide which was the best system, but in my judgment that does not give them power to affect the liability of ships. By cl. (*f*) they were empowered to "fix for the district the rates of payment to be made in respect of the services of a licensed pilot," and it was argued for the defendants that "services" there means not "services rendered," but "services available." I think that this only empowers them to fix the rate and not to add to the liabilities of the ship a liability to pay for a pilot when none is taken. It is to be observed that in ss. 49 and 55, which make provision for the recovery and collection of pilotage dues, the words used show that payments are only to be made for services actually rendered. In s. 49 the pilotage dues are "for any ship for which the services of a licensed pilot are obtained," and in s. 55 the dues for foreign ships are, as to ships inward, "for the distance piloted."

An interesting argument was founded on s. 59 from the historical point of view. That section preserves any "custom . . . . with reference to pilotage affecting any pilotage district in particular, and in force at the time of the passing of this Act," until provision is made by pilotage order or by-law under the Act superseding such custom. If one turns back to the Pilotage Act, 1812 (52 Geo. 3, c. 39), s. 63, and to the Pilotage Act, 1825 (6 Geo. 4, c. 125), s. 46, one finds that it was expressly provided in the case of foreign ships entering the Port of London that a liability for dues should be incurred even if no pilot were taken : but that legislation disappeared

1924

W. H. MULLER & CO. v. TRINITY HOUSE (DEPTFORD STROND).

Rowlatt J.

with the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120), and was replaced by the Merchant Shipping Act of the same year (17 & 18 Vict. c. 104), s. 381, and there has been no similar legislation since. The defendants rely upon the fact that they have taken these dues all the time, and that within ss. 368 and 376 of the Merchant Shipping Act, 1854, the power of the Trinity House to alter regulations is preserved. This cannot mean that the Trinity House can continue to charge fees for which the liability could only accrue under a section which has long been repealed. The provision in the Pilotage Act, 1913, s. 59, as to the Trinity House by-laws is not enough to make the charge here in dispute lawful merely because there is this provision in the old Acts and some evidence of acquiescence in those charges on the part of shipowners. There is no enactment in force authorizing the defendants to make this charge, nor is there any proof of custom. I think that s. 59 has application to matters which can be dealt with by pilotage order and by-laws, and it is not applicable to a fundamental question affecting the liability of a ship to pay pilotage dues when she has had no pilotage. In my judgment the defendants, although they have in one sense been following an old custom, have been proceeding on a basis which was not warranted, and therefore they cannot retain this money. If they cannot retain the pilotage dues neither can they retain the shipping moneys, which for this purpose are on the same footing.

As regards the rate of payment, even if the plaintiffs' ships ought to have gone to the Sunk, with which I do not agree, they have in fact taken a pilot at Margate, and the only thing he could do was to pilot them through the Tongue. The plaintiffs are therefore entitled to succeed both on the claim and counterclaim, and the sum claimed must be refunded. As regards the validity of the by-laws I shall make no general declaration, but only a declaration as regards the plaintiffs: (1.) that they are not liable to pay any pilotage dues or shipping moneys to the defendants in respect of any ship inward bound via the Tongue to Gravesend, which has not been piloted by a pilot; and (2.) that when one of their ships

is piloted from the Tongue to Gravesend, the pilotage rate payable is the rate from the Tongue Light Vessel to Gravesend and not that from the Sunk Light Vessel to Gravesend.

1924

W. H. MULLER & Co. v. TRINITY HOUSE (DEPTFORD STROND).

Judgment accordingly.

Solicitors for the plaintiffs : *Behrend & Co.*
Solicitors for the defendants : *Sandilands & Co.*

F. P. F.

PRESTON *v.* GRANT.

1924
Nov. 4.

Adulteration—Whisky diluted with Water—Prejudice of Purchaser—Notice—Constructive Notice—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

Where a sale has taken place of an article of food which was not of the nature, substance, and quality demanded, the presumption is that the purchaser has been prejudiced within the meaning of the Sale of Food and Drugs Act, 1875, s. 6, and it is no defence to a prosecution under that section to show that a general notice protecting the seller was exhibited, unless the purchaser actually saw the notice or his attention was drawn to it at or before the time of sale.

Dicta of Lord Alverstone C.J. in *Pearks, Gunston & Tee* v. *Houghton* [1902] 1 K. B. 889 considered.

CASE stated by justices for the county of Warwick.

An information under the Sale of Food and Drugs Act, 1875, s. 6 (1), was preferred by the appellant, an inspector under the Sale of Food and Drugs Acts, against the respondent, a publican carrying on business at the Black Horse Hotel, Nuneaton, charging him with unlawfully selling to the prejudice of the purchaser (the appellant) whisky which was not of the nature, substance, and quality demanded. At the hearing the justices dismissed the information, but stated a case for the opinion of the Court, which was in substance as follows :—

On November 26, 1923, about midday, the appellant

(1) 38 & 39 Vict. c. 63, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*. . . . ."

G

1924

PRESTON v. GRANT.

called at the Black Horse Hotel, Nuneaton, and in the bar saw the respondent's daughter. After asking for a drop of whisky, with which he was supplied and for which he paid 7*d*., he asked for half a pint of whisky. He was served by the respondent's daughter, and paid 5*s*. 10*d*. for it, informing her that the same was purchased for the purpose of being analysed by the public analyst. The appellant divided the sample into three parts properly sealed in bottles and labelled, one of which he handed to the respondent's daughter. The appellant on the same day sent another of such parts by prepaid registered post to the public analyst (and produced the third sample to the justices at the hearing). At the time of the sale a notice was exhibited in the bar over the fireplace, and the notice was also exhibited in a room at the back of the bar, which read as follows: "All spirits sold in this establishment are diluted and no alcoholic strength is guaranteed." The appellant did not observe the notice and his attention was not drawn to it, nor was he told that the spirits sold to him were sold as diluted spirits at or before the time he made the purchase. About a quarter of an hour after the purchase was completed and before he had left the premises the appellant observed one of the notices in the room at the back of the bar and afterwards saw a similar notice exhibited in the bar, and read both. The public analyst analysed the whisky, and certified that it was 42·26 degrees under proof. By the Licensing Act, 1921, s. 10, spirits must not be reduced more than 35 degrees under proof, but according to the analyst's certificate the sample contained "11 per cent. more water than 35 per cent. under proof whisky."

For the respondent it was contended that the appellant was not prejudiced by the sale to him of whisky diluted in 42·26 degrees under proof, inasmuch as the notice was sufficiently brought to his attention by being exhibited in the bar, and that the terms of the notice were plain and without ambiguity. The following cases were cited: *Sandys* v. *Small* (1); *Palmer* v. *Tyler* (2); *Gage* v. *Elsey* (3);

(1) (1878) 3 Q. B. D. 449. (2) (1897) 61 J. P. 389.
(3) (1883) 10 Q. B. D. 518.

Dawes v. *Wilkinson* (1); *Williams* v. *Friend.* (2) It was urged that in view of the notice the sale was not to the prejudice of the purchaser, even though he did not actually see it.

For the appellant it was argued that he demanded whisky, and that he was entitled to have supplied to him whisky not more than 35 degrees under proof, that no notice was given to him that the whisky was diluted beyond what was allowed by law, and that he was prejudiced by the sale to him of whisky diluted to 42·26 degrees under proof. Further, that even if he had seen the notice exhibited in the bar where the purchase was made (which he did not) he was still prejudiced, as its terms were ambiguous and not such as would justify a sale of spirits diluted to the extent of 42·26 degrees under proof, and the following cases were quoted and relied on: *Hoyle* v. *Hitchman* (3); *Taylor* v. *Scott Elder.* (4)

The justices were of opinion: (*a*) that the notice exhibited in the bar was a sufficient notice to the appellant, even though he did not see it, and (*b*) that by reason of the notice so exhibited the appellant was not prejudiced by the sale. The question for the Court was whether the justices were right in dismissing the information.

Paley Scott for the appellant. The onus is upon the licensee to show that the notice was brought to the purchaser's attention. Apart from s. 8 there is no statutory provision protecting the seller if notice is given. The protection depends upon a series of decisions beginning with *Sandys* v. *Small.* (5) The fact that the appellant was an inspector makes no difference. There are dicta to the contrary in *Pearks, Gunston & Tee* v. *Houghton* (6), in which the seller was held to be protected by the notice displayed on the wall of the shop on a sale to an inspector, but the decision really turned on the fact that the buyer got what he demanded—namely, blended butter, which was the only kind of butter

(1) [1907] 1 K. B. 278.
(2) [1912] 2 K. B. 471.
(3) (1879) 4 Q. B. D. 233.
(4) Unreported. Divisional Court, April 18, 1923.
(5) 3 Q. B. D. 449.
(6) [1902] 1 K. B. 889, 897.

1924

PRESTON v. GRANT.

sold by the appellants in the case. *Taylor* v. *Scott Elder* (1), a recent case, is in the appellant's favour.

Here the purchaser asked for whisky and received an article which was not whisky, being diluted far beyond the limit allowed by statute. The seller did not bring this to his knowledge at or before the purchase was completed and the magistrates ought therefore to have convicted.

Birkett K.C. and *Entwistle* for the respondent. The seller is not required to bring the notice to the attention of every purchaser. If the notice is itself sufficient for the average purchaser, as the justices have here found, the seller is protected, and the fact that it did not reach a particular purchaser is immaterial. The Sale of Food and Drugs Act, 1875, s. 8, expressly provides that no offence is committed where a written or printed label supplied with the article states that it is "mixed." The same principle with regard to a written or printed notice should be read into s. 6. This view was taken by Lord Alverstone C.J. in his judgment in *Pearks, Gunston & Tee* v. *Houghton* (2), and the decision applies to the present case, in which there is a specific finding by the justices that the purchaser was not prejudiced. There, as here, the purchaser was an inspector under the Act, and he is obviously in a different position to an ordinary purchaser. As the sufficiency of a notice is a question of fact, so also is the question whether it was brought to the knowledge of the purchaser: *Palmer* v. *Tyler*. (3) There are no cases which support the view that the purchaser is prejudiced in law if he does not see the notice. In *Taylor* v. *Scott Elder* (1) the notice was ambiguous, and the decision turned on the particular facts of the case. The justices were here entitled to hold that no offence was committed within s. 6.

No reply was called for.

LORD HEWART C.J. [after stating the facts and findings of the justices continued]: The justices have here found on sufficient evidence that the purchaser did not see the notice,

(1) Unreported. Divisional Court, April 18, 1923.

(2) [1902] 1 K. B. 889, 897.

(3) 61 J. P. 389.

had not his attention drawn to it, and was not informed of the defect in the article sold. The question is whether in such circumstances the notice was sufficient. In other words, is constructive notice sufficient? The Sale of Food and Drugs Act, 1875, s. 6, says: "No person shall sell"—the prohibition being imperative and universal, subject to named exceptions. No doubt, in the line of cases decided with reference to the Act, one finds a series of observations on the particular position of the inspector. It is easy to draw a mistaken inference from some of them, and in my opinion they are intended to prevent the administration of this statute from being hindered by the particular knowledge and function of an inspector employed for the purposes of the Act. In this country, as has been frequently pointed out, the special knowledge and purposes of an inspector are to be disregarded. In Scotland a different view was taken, but by the Sale of Food and Drugs Amendment Act, 1879, it is now no defence to a prosecution under the principal Act to allege that the purchaser having bought only for the purpose of analysis was not prejudiced by the sale. Therefore, both in England and in Scotland, the question is, "Did the defendant sell to the prejudice of the purchaser an article of food not of the nature, substance, and quality demanded by such purchaser?" Here there was a sale, and an article was demanded by the purchaser—namely, whisky. The article sold was not of the nature, substance, and quality demanded, being whisky diluted so as to be 42 per cent. under proof. The seller must show that the purchaser is not prejudiced, and no more knowledge must be attributed to an inspector than to an ordinary purchaser. He was prejudiced if the article sold was not of the nature, substance, and quality demanded. A practice has grown up on the part of sellers of exhibiting notices which are to serve as an answer to allegations under the Sale of Foods and Drugs Act, 1875, s. 6. These notices vary in terms, but the use to which they are all put is this—the seller says that the purchaser is not prejudiced, because he had notice of the difference between the article which he demanded and that which he received. The question of the sufficiency of the notice is not material in the present

1924

PRESTON v. GRANT.

Lord Hewart C.J.

case, but in no case has it been held to be a good answer to a charge under s. 6, that the seller exhibited a notice which the purchaser did not see and to which his attention was not called, and of whose existence he did not know. The respondent here relies on *Pearks, Gunston & Tee* v. *Houghton* (1), but the facts there were quite different and the question of notice was really a subordinate question in the case. Lord Alverstone C.J. said in his judgment: "This case is not satisfactorily stated. If the Court were satisfied that the substance sold was sold as butter and nothing else was said about it, there would be evidence of an offence under s. 6: that is in effect the decision in *Pearks, Gunston & Tee* v. *Knight* (2), in which case I should myself have come to the same conclusion. But that is not what we have here to consider. The substance asked for and purchased was a half pound of shilling butter. If it were to turn out that there were various classes of butter in the appellants' shop, and that this was merely butter which was sold at a certain price—that is, at a different price to the other butters —I might have to give a very different effect to the notice displayed in the shop to that which under the circumstances I think should be given to it. I understand the facts to be that the appellants were selling one sort of butter only, blended butter: drawing as I do this conclusion from the facts appearing in the case, the case is different from that of a man selling various kinds of butter and putting up a notice like this with a view to his protection." The part of the judgment which dealt with the notice must be read in close connexion with that opening statement. The purchaser in that case did not indeed see, nor was his attention called to the notice, but the Court held that he there got what he demanded. As Channell J. said: "One of the questions for us in the present case is whether there was sufficient evidence of a sale to the prejudice of the purchaser—whether the butter was in fact sold as blended butter or merely as butter," and he held that the sale was intended to be a sale of blended butter.

These judgments do not in any way help the respondent

(1) [1902] 1 K. B. 889, 895, 899.

(2) [1901] 2 K. B. 825.

upon the very different facts of this case. Here the appellant did not observe the notice, and his attention was not drawn to it. He got something different from what he demanded, whereas in *Pearks, Gunston & Tee* v. *Houghton* (1) the purchaser got the article which he demanded—namely, blended butter. The whole question is whether the respondent was protected by the notices. In my opinion he was not so protected. There is no such thing as constructive notice in a case of this kind. Each purchase is an isolated transaction, and if the seller chooses to have recourse to a general warning, he runs the risk of being unprotected owing to the notice not reaching the particular purchaser. Where a sale has taken place of an article of food, which is not of the nature, substance and quality demanded, the presumption that the purchaser has been prejudiced is not rebutted by proof of the existence of a notice which he did not see and to which his attention was not called.

SHEARMAN J. I agree. The object of the Sale of Food and Drugs Act, 1875, s. 6, is to insure that the purchaser shall get what he asks for, and if the seller seeks to alter this, he must inform the purchaser before the transaction takes place. In s. 8 a special protection is given by the use of labels, and the seller is protected even if the purchaser does not see the label and is prejudiced. This does not, however, affect the general scheme of the Act, which does not deal with sales to inspectors, but with individual sales to particular purchasers. For the purposes of the Act inspectors were appointed, and most prosecutions are instituted by them. There was formerly a difference in the case of a sale to an inspector, who bought for purposes of analysis under the Act, between the attitude adopted in Scotland and that adopted by the Courts in this country. The Legislature adopted the English rule, and to give effect to this the Sale of Food and Drugs Amendment Act, 1879, was passed. It cannot now be said that an inspector who goes to effect a

(1) [1902] 1 K. B. 889 895. 899.

1924

PRESTON v. GRANT.

Shearman J.

purchase in a case of this kind is not prejudiced, although his object is not that of a private purchaser. When an inspector goes to purchase an article the justices must consider for what article he asked. If a different article is supplied to him from that asked for, the justices must consider whether notice of this was brought to his knowledge beforehand. The inspector is in the same position as the private purchaser contemplated by the Act—namely, that if he asks for one thing, for example, whisky, the seller must, if such is the case, explain that he is selling him something different. The Act does not deal with the average or hypothetical buyer. The question has been raised as to the position of a blind man, and it has been argued that a general notice would be sufficient to protect the seller, but I think that such a notice would not avail, if the sale was to the buyer's prejudice. As regards an inspector, with him as with an ordinary person, if an article is asked for and a different article is supplied without proper notice, the purchaser is prejudiced. *Sandys* v. *Small* (1) is the leading case upon this point, and, while it is true that in *Pearks, Gunston & Tee* v. *Houghton* (2) there are dicta to the effect that an inspector is in a peculiar position, in *Hayes* v. *Rule* (3) Lord Alverstone C.J. distinguished *Pearks, Gunston & Tee* v. *Houghton* (2) on the ground that in *Hayes'* case the purchaser asked for "half a pound of best fresh butter" and did not get it, whereas in *Houghton's* case the purchaser asked for half a pound of "shilling butter" and got it. I know of no case which interferes with the plain interpretation of s. 6, that the onus is on the person who has sold an article of food different from that which the purchaser demanded to show that the notice did in fact reach the purchaser.

SALTER J. Where, as here, the seller relies on written notice, he must prove that notice of any circumstance which he was required to make known was in fact conveyed to the purchaser. He must prove that the purchaser understood the notice. If the notice was conspicuous, the justices would

(1) 3 Q. B. D. 449. (2) [1902] 1 K. B. 889.
(3) (1902) 87 L. T. 133, 135.

be more likely to hold that the purchaser saw it, but here they have found as a fact that he did not see it, and for that reason the defence fails.

1924

PRESTON v. GRANT.

Appeal allowed.

Solicitors for appellant: *Waterhouse & Co., for Buller, Cross & Jeffries, Birmingham.*

Solicitors for respondent: *Godden, Holme & Ward, for P. Baker & Co., Birmingham.*

F. P. F.

THE KING *v.* CITY OF LONDON ASSESSMENT COMMITTEE.

1924

Oct. 29, 30, 31.

Ex parte LOVELL.

Rates—Metropolis—Occupation by Crown—Increased Rent—Contribution by Crown in Lieu of Rates—Provisional List—Insertion of Contribution as rateable Value—Omission of gross Value—Validity—"If in the course of any year the value . . . . is from any cause increased"—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *s.* 30—*Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 45, 47.

In 1921 certain premises in the Metropolis were leased to the Crown at a rent largely in excess of the value appearing in the valuation list. The premises consequently ceased to be rateable, but in 1923 the Crown paid a certain sum as a contribution in lieu of rates. In the same year a provisional list, under s. 47 of the Valuation (Metropolis) Act, 1869, was made, and in purported compliance with s. 30 of the Union Assessment Committee Act, 1862, the amount of the said contribution in lieu of rates was entered therein as rateable value, but no entry was made under the head of gross value. The list had not been made before, as the amount that would be contributed by the Crown in lieu of rates was not known until 1923:—

Held, that the list was bad, as not complying with the requirement of s. 47, sub-s. 1, of the Act of 1869, that it should contain both the gross and the rateable values.

By Shearman J. also on the ground that the increase in value did not take place in the course of the year in which the provisional list was made within the meaning of s. 47 of the Act of 1869.

By Salter J. also on the ground that the fact that the Crown paid a largely increased rent did not constitute an increase in value within the meaning of the section.

RULE NISI for certiorari.

In 1920 premises having two frontages and known as

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.*

33 King Street and 9 Lawrence Lane in the City of London were owned by the King Street Syndicate, Ld. The premises were then assessed at 548*l.* gross and 457*l.* rateable at the quinquennial valuation made in that year under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), which valuation came into force on April 6, 1921. On September 2, 1921, a lease of part of the premises was granted to the Postmaster-General for twenty-one years from March 25, 1921, at a rent of 925*l.* for the first seven years, 1165*l.* for the second seven years, and 1265*l.* for the third seven years, the rent being reduced in consideration of his agreement to pay rates. Certain alterations were made and the premises were opened as a post-office on October 26, 1921. The Postmaster-General had actually been in possession since March 18, 1921, and paid rent from that date. In May, 1921, a provisional list was made in which the part of the premises occupied by the Postmaster-General (herein referred to as the post-office) was rated at 282*l.* gross and 235*l.* rateable. Being however in the occupation of the Crown no rates were payable in respect of these premises, but, in accordance with the usual custom of the Crown, a sum in lieu of rates was in fact paid as fixed by the Treasury valuer. Following the custom existing for the past thirty years in the City of London, the amount was not fixed by the Treasury valuer until all appeals to quarter sessions against the valuation list had been determined, namely, some time in 1923. when he fixed it at 568*l.* On September 25, 1923, a provisional list was made, in which the post-office was assessed at 568*l.* rateable, no gross value being entered. On November 2, 1923, the said premises, including the post-office, were purchased by the prosecutor, Clifford Percy Lovell, and they were assigned to him on December 5, 1923, subject to the said lease to the Postmaster-General. On December 21, 1923, this rule was obtained, calling on the respondents to show cause why the provisional list of September 25 should not be quashed on the following grounds (inter alia) that (*a*) there was no increase of value of the said premises during the year within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869; (*c*) the gross value of the

premises did not appear therein, but the rateable only; (*e*) no notice of the making of the list was served on the owner—who, under contract—namely, the agreement that a smaller rent be paid in consideration of the said undertaking of the Postmaster-General to pay rates—in effect paid the rates within the meaning of the Valuation (Metropolis) Amendment Act, 1884 (47 Vict. c. 5), s. 2. The applicant alleged that by reason of the enhanced value in the provisional list his income tax under Sch. A was increased, the said list being made conclusive evidence under s. 45 of the Valuation (Metropolis) Act, 1869.

Charles K.C. and *S. G. Turner* showed cause. This rule ought to be discharged. The provisional list was made in order to satisfy the provisions of s. 30 of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103). (1) The three conditions precedent to the making of this list specified by Lord Parker of Waddington in *London County Council* v. *Islington Assessment Committee* (2) are present in this case; firstly, an increase in value, secondly, an increase occurring in

(1) Union Assessment Committee Act, 1862, s. 30: "When the assessment committee for any union shall have approved valuation lists for all the parishes comprised within such union, the guardians of such union, in computing the amount of contribution to the common fund for the several parishes, shall . . . . take the annual rateable value of the property in such parishes respectively from the valuation lists . . . . for such parishes respectively. . . . . Provided that in case any parish . . . . shall receive any sum of money as a contribution in aid of the poor rate of such parish, for or in respect of Government property within such parish and used for public purposes, the annual value of such property, according to the estimate (if any) of such value on which the amount of the sum of money so received is computed . . . . shall be included . . . . in the valuation list of such parish, and shall be added to the annual rateable value of the property in such parish in computing the amount of contribution to the common fund . . . ."

Valuation (Metropolis) Act, 1869, s. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect: (1.) The overseers of the parish in which such hereditament is situate may [and in certain events shall] send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament."

(2) [1915] A. C. 762, 772.

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.*

the year of the quinquennial period in which the provisional list was made, and thirdly, an increase due to a cause specially affecting the hereditament. The larger rent paid shows the increase in value, and the increase occurred in the course of the year, because s. 47 of the Valuation (Metropolis) Act, 1869, says " any year " without specifying any particular year in the quinquennium, and for rating purposes the year in which the increase must be assumed to have occurred is the year when it was first possible to ascertain it. And the increase was due to causes specially affecting this hereditament —namely, the lease to the Crown, the enhanced rent, the change in the mode of occupation, and the occupation of premises previously empty. When the premises were let to the Crown they became unrateable, and they were properly removed from the list. And they were put into the provisional list when the amount of contribution in lieu of rates was ascertained, because there was nowhere else to put them. The statutory duty to include them in some list is imperative : see s. 30 of the Union Assessment Committee Act, 1862 (1) (which Act is incorporated in the Valuation (Metropolis) Act, 1869, by s. 1), and s. 47 of the latter Act. (1) Therefore the provisional list is a valid list.

The applicant has no interest entitling him to a rule. He is not prejudiced with regard to his income tax as alleged, because the list contains no gross value, and it is on the gross value that income tax is based—s. 45 of the Act of 1869 and Schs. A, r. 1, and B, r. 1, to the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40). Therefore in its discretion the Court ought to discharge this rule.

R. P. Hills for the inspector of taxes. Although the applicant has not applied for a rule against the revenue authorities it is really against them that he seeks relief. The contribution in lieu of rates was rightly inserted in the provisional list, because the object of s. 47 of the Act of 1869 was to bring the valuation list, of which it is deemed to form part—see s. 47, sub-s. 10—into accordance with the actual state of things. And it was necessary to do this by means

(1) See note (1) ante, p. 187.

of a provisional list, because there was an increase in value of the hereditament, shown by the largely increased rent, which resulted from structural alterations of the premises and their application to a different use—namely, that of a post-office. With regard to the suggestion that the increase in value must take place in the year in which the list is made, it is to be noted that s. 47, sub-s. 1, says that if in the course of any year the value is increased the overseers "may" make a provisional list—it does not say "may in that year" make such a list; therefore it can be made in any year of the quinquennial period, if in that or any other year of that period an increase takes place.

[*London County Council* v. *Islington Assessment Committee* (1) was referred to.]

Secondly, the object of the Act of 1862, as appears from the preamble, was "that more effectual provision should be made for securing uniform and correct valuations of parishes in the unions." Sect. 30 of the Act (2) enacts that in computing the amount of the contribution of the parish to the common fund, the overseers must take the annual rateable value of the property therein from the valuation list. The proviso to the section enacts that if the parish receives a contribution in lieu of rates —as in the present case—the "annual value," ascertained as therein directed, shall be included in the valuation list of the parish. The Act of 1862 is incorporated in the Act of 1869 by s. 1 of the latter Act, and they must therefore be read together, and the provisional list made under s. 47 of the latter Act must be moulded so as to apply to the various kinds of property. That section, therefore, does not speak of "gross" or "rateable" value, but of "annual value." Crown property cannot, consequently, be entered as having a gross or rateable value, but only as having an annual value, and it must be entered in the list, although it has ceased to be a rateable hereditament. With regard to the income tax, s. 45 of the Act of 1869 enacts that in construing the Income Tax Act, 1842, and any Act amending it—e.g., the present Income Tax Act, 1918—"annual value shall be deemed to mean the gross

(1) [1915] A. C. 762, 772. (2) See note (1) ante, p. 187.

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.*

value stated in such list"—i.e., the valuation list. As property occupied by the Crown has no gross value this provisional list is not conclusive for income tax purposes. But Crown property must be dealt with, and as it has no gross or rateable value it has been customary to include it according to its annual value in the column for rateable value.

The applicant is not aggrieved, nor is he affected by the valuation list, but by the facts upon which it is based.

Montgomery K.C. and *E. G. Palmer* in support. The Act of 1869 by s. 51 provides that every hereditament, with certain exceptions, shall be inserted in the valuation list, and s. 4 defines "hereditament" as "any lands, tenements, hereditaments, and property which are liable to any rate or tax in respect of which the valuation list is by this Act made conclusive." Sect. 45, sub-para. (*b*), of the Act makes the valuation list conclusive for income tax purposes where that tax is charged on the gross value and not on profits, and income tax is so charged under Schs. A and B. The assessment committee in inserting this hereditament have not inserted the gross value, thus making the same kind of mistake as was made in *Rex* v. *City of London Union Assessment Committee* (1), which was a case of exempted property. As Fletcher Moulton L.J. pointed out (2), both gross and rateable values should be entered. It is incorrect to say that this property should be expunged from the valuation list, when it ceases to be rateable; but s. 30 of the Act of 1862 provides that an additional entry be made therein in respect of contributions in lieu of rates. The mistake in this case is founded on the idea that if it so appear in the valuation list the rate book will contain the gross and rateable values and also the annual value. But the rate book does not contain property which is not rateable, although it may be taxable, and would not therefore contain this annual value. But the valuation list must contain the gross, rateable and annual values for the purpose of calculating the parish contribution to the common fund, and for the other purposes for which it exists. There is an important distinction

(1) [1907] 2 K. B. 764. (2) Ibid. 790.

between s. 47 of the Act of 1869 and s. 30 of the Act of 1862. The former directs the insertion of new figures, the effect of which is to get rid of the old figures. Sect. 30 gets rid of nothing, but merely makes an addition, which is made for its own particular purpose. If the provisional list is to supersede the old list it must contain both gross and rateable values, and there is no right to insert a rateable value unless there is a gross value.

[They were stopped.]

LORD HEWART C.J. This is a rule nisi for a writ of certiorari directed to the assessment committee of the parish of the City of London to remove into this Court a certain provisional valuation list dated September 25, 1923, upon certain grounds set out in the rule. The argument has been extremely interesting, and has ranged over a wide field, but I shall confine myself to what is necessary for the purpose of dealing with the particular point now before us. The matter arises in this way. Premises in the City of London, 33 King Street and 9 Lawrence Lane, were owned by the King Street Syndicate, Ld. In 1920, in the quinquennial valuation made under the provisions of the Valuation (Metropolis) Act, 1869, those premises were assessed at 548*l.* gross and 457*l.* rateable, and on November 2, 1923, the premises were purchased by the applicant, Clifford Percy Lovell, and assigned to him on December 5 following. Certain things had happened to these premises some time before Mr. Lovell's purchase. On September 2, 1921, a lease of the ground floor, the basement, and certain other rooms on two other floors was granted to the Postmaster-General for twenty-one years from March 25, 1921, at a rent of 965*l.* for the first seven years, 1165*l.* for the second and 1265*l.* for the third seven years. In view of the division which was made in the occupation and user of the premises the Postmaster-General's portion and the other portion were separately assessed in a provisional list in the spring of 1921, the former portion being entered in the list at 282*l.* gross and 235*l.* rateable value. The practice where the Crown occupies premises and uses them for public purposes

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.*

Lord Hewart C.J.

—premises which are not therefore in the strict sense liable to be rated—is for the Crown, ex gratia, and as a matter of general fairness, to make a contribution in lieu of rates, the amount being determined by the Treasury valuer. It is a little important to observe the precise nature of that contribution. It is not necessary that the Treasury valuer in order to arrive at the appropriate figure should hear any party, nor that the figure at which he ultimately arrives should bear any precise or traceable relation to what is thought to be a fair rental for the premises. But, acting according to his discretion, he does, in fact, arrive at a figure, which then becomes for the purpose of s. 30 of the Union Assessment Committee Act, 1862 (1), the annual value of the property. It is interesting to observe that the matter is dealt with in a mere proviso to that section, the topic of the section being the computation of the amount of contribution to the common fund. The section provides: [His Lordship read it. (1)]

Now in the present case the figure fixed by the Treasury valuer proved to be 568*l.* That did not purport to be the rateable value; it did not purport to be the gross value; it was a figure sui generis representing the Government contribution, which thereupon, by operation of law, was to be treated for a particular purpose as the annual value. Up to that time, as I have said, the gross value in the valuation list was 282*l.* and the rateable 235*l.*, for the amount of the Government contribution was not known to the assessment committee until 1923, although no doubt they had expected that they would eventually receive a contribution in lieu of rates from the Crown. What steps did they take in 1923 when they did know the amount? They purported to make a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869, and it is that list which it is sought to have quashed.

It is not necessary that I should enter in any detail into an examination of s. 47 of the Act of 1869. A question has been raised as to the true interpretation of that section with reference to the opening words: "If in the course of any year the value of any hereditament is increased, etc." It is

(1) See note (1) ante, p. 187.

said on the one side that in order that the condition precedent may be fulfilled, which is necessary before the particular machinery of the section can be set in motion, there must not only be an increase in the value of the hereditament, but that increase must be due to a cause of which the genesis and the inception are within the year in which the provisional valuation list is made. I do not think it is necessary to express any final opinion upon that point. I make two observations only. Reference has been made to certain passages in the speech of Lord Parker of Waddington in the case of *London County Council* v. *Islington Assessment Committee.* (1) He says: "In order to bring s. 47 of the Act [of 1869] into operation there must be an increase or reduction in the value of the hereditament in question, and this increase or reduction must have occurred in the course of the year of the quinquennial period in which the provisional list is applied for, and must be due to some such cause as referred to in the section." The words of that speech upon which stress is sought to be laid are "must have occurred in the course of the year," but it is rightly pointed out that in the very next sentence Lord Parker goes on to say that "the cause referred to in the section must be a cause operating during the year," and again he says (2): "In the present case the cause of the alleged decrease in value of the appellants' tramways is said to be the competition of motor omnibuses. This is admittedly such a cause as is contemplated in s. 47, and it has operated during the year in which the provisional list was applied for." There the contrast is clearly pointed out: "must have occurred" on the one hand, "has operated during the year" on the other hand.

What is said in the present case is that this change in mode of occupation, accompanied by structural alterations enormously enhancing the yield of the premises as premises, was such a cause as is contemplated in s. 47, and that although as a matter of history the cause of the increase in the value took its rise in 1921, it continued no less in 1922 and 1923, and it was not until 1923 that the rating authority had the

(1) [1915] A. C. 762, 772. (2) Ibid. 773.

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.*

Lord Hewart C.J.

information with regard to the Government contribution provided for by s. 30 of the Act of 1862. Speaking for myself I am far from suggesting that if proper steps had been taken this is not a case in which, in the year 1923, the rating authority might have made a provisional list, and it may well be that even now it is not too late for that step to be taken. I refrain from expressing any opinion on the point, because it is not necessary to this case. Certainly it is not to be assumed that any one is intended to bear an unfair burden or enjoy an improper benefit. The purpose of rating statutes is to secure that the rating shall always be fair and adjusted to the actual facts.

But the question is, did the rating authority in this case make and publish such a provisional valuation list as is contemplated by s. 47? In the list before us assessment in force at the date of the list is divided into gross value 282*l.*, rateable value 235*l.*, and then comes another column "Gross value as estimated by overseers," which is blank; then "Rateable value 568*l.*" And then in the last column of the list the figure 568*l.* is inserted under the heading "Rateable value as finally determined by assessment committee." In other words the committee, without taking the steps indicated in s. 47 of the Act of 1869—e.g., service of notice under sub-s. 3—have purported to make a provisional valuation list which contains no gross figures at all, and merely adopts and places under the head of "Rateable value as finally determined by assessment committee" the figure of 568*l.*, which the Treasury valuer happened to hit upon as an appropriate quantum for the Government contribution in lieu of rates. In history and in form this list does not exhibit the marks of a true provisional valuation list. It is not suggested that the assessment committee brought their minds to bear upon the question what in the altered circumstances was the true gross, what in the altered circumstances was the true rateable value. It is conceded that this list was put forward merely as what was believed to be the appropriate, and indeed the only, machinery for carrying out the statutory duty prescribed by s. 30 of the Act of 1862. But is the provisional list the only

machinery for that purpose? What that section provides is that in the cases to which it refers the annual value of such property—that is Government property used for public purposes—"shall be included . . . . in the valuation list." I am not at all prepared to hold that the only way of securing that end is to publish a provisional valuation list. As at present advised I see no reason why that figure of annual value should not by a suitable note upon the valuation list be included therein, so as to bring that figure into the calculation when the contribution as between parishes is being computed. It was suggested by Mr. Montgomery in support of the rule that the meaning is that the figure for annual value is to be included in the valuation list without prejudice to the gross figure therein already appearing. It is not necessary for the purposes of this case to decide that point, but I am far from thinking that that suggestion is correct. I cannot imagine that the old gross figure could co-exist so as to be conclusive for income tax purposes under Sch. A side by side with a much larger figure for annual value under s. 30 of the Act of 1862. The taxpayer has the advantage where Sch. A of the income tax is the matter for consideration of saying that the gross figure contained in the valuation list is conclusive for the purposes of income tax. So it is; but it may well be that material for an argument against its conclusiveness would exist where there appeared in one and the same valuation list with reference to one and the same hereditament a particular figure for gross value, and a much larger figure, accompanied by a suitable footnote, for the annual value. Certainly if the rating authority took the proper steps in a proper case, which I believe this case to be, to make a provisional valuation list under s. 47 of the Act of 1869, they might insert figures which would supersede the figures in the original valuation list. But if that course were taken it would involve much that has not been done in the present case, and the omission of some things which have been done. It would be necessary in such a case for the rating authority to arrive, upon proper grounds, at the true gross and true rateable values, and that task has not been performed here. It is not so much as begun to be

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.*

Lord Hewart C.J.

performed by merely transcribing into a document called a provisional valuation list the figure which the Treasury valuer had arrived at. It might be, by a miracle, that after examination the figures of the gross rental and of the Government contribution determined by the Treasury valuer would be found to coincide. More probably they would not coincide. But at any rate, what has happened here is that the figure of 568*l.* has been lifted from one sheet of paper to another, and then the second sheet of paper is put forward as a provisional valuation list though nothing further has been done. In my opinion, therefore, this provisional list does not satisfy the conditions of a provisional valuation list. I am anxious not to say anything to prejudice the position of the income tax authorities, whose case has been so ably put by Mr. Hills, nor do I think that anything in my judgment will have that effect. I merely find, on the materials before us, that this provisional valuation list, although it might have been made in proper form, is not in proper form. I think therefore that this rule should be made absolute. I may add for the sake of clearness that I base my judgment upon grounds (*c*) and (*e*) in the rule, and not upon any other grounds.

SHEARMAN J. I am of the same opinion. The salient facts of the case are that prior to March, 1921, the premises in question were in private occupation and rateable. About that time possession was given to the Postmaster-General, who commenced to make structural alterations, and on his going into occupation the premises ceased to be liable to rates. In the quinquennial valuation list a comparatively low value had been put on the premises then in private occupation, and also in the provisional list made in 1921, where the premises were separately assessed. No alteration was made until in July, 1923, the Treasury valuer sent an intimation that for the purpose of contribution in lieu of rates he had fixed on the sum of 568*l.* Thereupon on September 25, 1923, the assessment committee purported to make a provisional valuation list. In that list under the heading " Gross value as estimated by overseers " there is a blank ; under " Rateable

value "—not "value for the purpose of contribution"—"568*l*." Then "Gross value as finally determined by assessment committee" is blank, and "Rateable value as finally determined by assessment committee, 568*l*." I agree with my Lord that this case can be disposed of on the simple ground that this list is nothing more than an automatic registration of the estimate of the Treasury valuer, and that it is entirely incorrect, because by s. 47, sub-para. 1, of the Valuation (Metropolis) Act, 1869, it is directed that every provisional valuation list shall contain both the gross and the rateable value. I desire to add this, though I do not wish to prejudice the discussion of any question which may hereafter arise. I think that in addition to an intention to adhere to the general principle that everybody should pay a fair rate, a definite scheme is laid down in the Act of 1869, that when a quinquennial list has been made it should remain for five years undisturbed, even though it may contain mistakes of under-valuing on the one hand or of over-valuing on the other, unless it is altered in accordance with the strict provisions of the Act. Under those provisions it can only be altered in two ways—namely, by a supplemental list under s. 46 and by a provisional list under s. 47. Sect. 47 lays down the conditions of alteration: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value." It has been pointed out by the Court of Appeal in *Reg.* v. *Poplar Union* (1) that the condition precedent to that is that the alteration in value must be during the current year, and in *Camberwell Assessment Committee* v. *Ellis* (2) it was held that the cause of the alteration must be one specially affecting the premises in question. In the present case the alteration took place at the latest when the premises were opened in 1921, and not in 1923, when the provisional list was made, and in my judgment the list ought to be set aside on that ground also.

SALTER J. I agree; and if I add a few words it is

(1) (1884) 13 Q. B. D. 364. (2) [1900] A. C. 510.

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.* Salter J.

because the matter is one of importance and not altogether free from difficulty.

This Court has to consider whether this list is invalid, and if invalid whether in the exercise of its discretion it should be quashed. In my opinion it is invalid in that it purports to be made under s. 47 of the Act of 1869, and is not justified by that section. The section provides that if certain events happen there shall be power given to, and sometimes a duty imposed upon, the rating authority to make a provisional list. I think that the events contemplated by the section have not in this case happened, and, if they have happened, no provisional list has in fact been made. The first event that must happen is that there must be an increase or reduction in the value of the hereditament. The facts are that in 1921 the premises passed into the occupation of the Postmaster-General, who paid a rent largely in excess of the figures in the provisional list in 1921. There is nothing before us which authorizes us to suppose that there has been any physical change which would bring this case within s. 47. Again, I could understand the argument that the fact of occupation of a hereditament as a post-office of itself increased its rateable value, but there is nothing to support any such view here. All we have is that Mr. Lang, who is an expert, in an affidavit made in support of the rule, states that in his personal knowledge there was no increase in the value of this hereditament. It is therefore reduced to this, that a hereditament rated at a certain figure is at a given time subsequently let to a particular tenant who pays a rent largely in excess of the figure in the valuation list. That may prove that the particular tenant is paying an exceptionally high rent, or that the valuation in the valuation list is too low; but the mere fact that a larger rent is obtained from a particular tenant does not appear to me to cause any increase in the value of the hereditament. But, if there is an increase in value, such increase must arise from a cause in the course of any year. The Court of Appeal has construed the words "in the course of any year" (1), but their application in particular cases is often very difficult, and

(1) In *Reg.* v. *Poplar Union*, 13 Q. B. D. 364.

I should prefer not to express any opinion upon the point in this case, as it is not necessary. My main reason for thinking that this list is bad is because, whether these preliminary conditions have been fulfilled or not, no provisional list has in fact been made. A provisional list in its essence is a revaluation by the rating authority first of the parish and then of the union; there is no provisional list unless the overseers apply their minds to the question whether their existing figures shall be varied, and unless their views are confirmed with or without amendment by the union assessment committee. The matter fails in limine here; there is no consideration by the overseers at all, and even if one could think that by a strange coincidence they hit upon exactly the same rateable value as the Treasury valuer, they can only do that, according to law, by first ascertaining the gross, and then applying their minds to the question of deductions in order to ascertain the rateable. This it is obvious they have never done.

An attempt was made to support this list on the ground that it was a clumsy compliance with s. 30 of the Act of 1862, unfortunate only in its form. I do not think it is even that. Sect. 30 requires, among other things, that the Treasury valuer's figure shall be included in the valuation list. A provisional valuation list, duly made, forms part of the valuation list, but this document not being a proper provisional valuation list never formed any part of the valuation list, and therefore, to put this figure into this document is not to include it in the valuation list. Sect. 30 has not been complied with. With regard to the question how s. 30 ought to be complied with I have nothing to add.

The only remaining question is whether the Court should exercise its discretion and quash the list. The applicant intends to claim that his income tax assessment shall be based on the figure in the provisional valuation list of 1921, and the taxing authorities have intimated that that is not a view in which they can concur. I wish to make it very clear that I express no sort of opinion on the merits of these contentions; but the applicant is confronted here by this

1924

REX v. CITY OF LONDON ASSESSMENT COMMITTEE. LOVELL, *Ex parte.*

provisional valuation list, and says it is an illegal, invalid and misleading document, and invites us to quash it, and I think we ought to do so.

Rule absolute.

Solicitor showing cause: *The City Solicitor.*
Solicitor for Inland Revenue: *Solicitor of Inland Revenue.*
Solicitors in support: *Charles Stevens & Drayton.*

W. L. L. B.

1924

Nov. 11.

THE KING *v.* LANCASHIRE JUSTICES.

Ex parte TYRER.

Bastardy—Affiliation Order—Non-payment of Sum due under Order—Enforcement of Order—Jurisdiction of Justice to inquire into Validity of Order—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *ss.* 3, 4.

By s. 3 of the Bastardy Laws Amendment Act, 1872, any single woman who has been delivered of a bastard child may make application to a justice of the peace acting for the petty sessional division of the "place in which she may reside" for a summons to be served on the man alleged by her to be the father of the child.

A woman who was with child went to stay at the house of her sister, who lived in a different petty sessional division from that in which the woman usually resided. The woman went home to be confined, and fourteen days after the birth of her child she went back to her sister and stayed with her for a month. Eight days after the commencement of this visit the woman applied to a justice of the peace acting for the petty sessional division of the place where her sister resided for a summons against the man alleged by her to be the father of her child:—

Held, that the woman resided in that petty sessional division within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, so as to give the justices of that petty sessional division jurisdiction to make an affiliation order against the putative father, as that section did not require that the application should be made to a justice of the peace acting for the petty sessional division of the place where the woman usually or permanently resided.

Where an affiliation order has been made which is not appealed against, or where there has been an appeal to quarter sessions against the order and the appeal has been dismissed, and subsequently an application is made to justices to enforce the order by the issue of a distress warrant, the justices have no jurisdiction to enter into any inquiry as to the validity of the original order.

1924

REX v. LANCASHIRE JUSTICES. TYRER, *Ex parte.*

RULE NISI to certain justices of the peace for the petty sessional division of Leyland in the county of Lancaster to show cause why they should not proceed to hear and determine a certain complaint preferred by one Mary Ellen Tyrer against Thomas Iddon, alleging that Iddon had neglected or refused to make payment of certain sums due from him under an affiliation order dated February 18, 1924.

On December 19, 1923, Mary Ellen Tyrer was delivered of an illegitimate child.

On January 10, 1924, she applied under s. 3 of the Bastardy Laws Amendment Act, 1872 (1), to one of the justices for the petty sessional division of Leyland for a bastardy summons against Thomas Iddon, and she alleged that she resided at 32 Old Crooke Farm, Leyland Lane, in the petty sessional division of Leyland.

Upon the hearing of the summons on February 18, 1924, the said M. E. Tyrer repeated that she resided at 32 Old Crooke Farm, Leyland Lane, aforesaid, and that the child of which she alleged Thomas Iddon to be the father was born at the said farm on December 19, 1923. The justices, believing that she resided at Leyland, within the jurisdiction of the Court, no objection having been taken to the jurisdiction of the Court,

(1) Bastardy Laws Amendment Act, 1872, s. 3: "Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may . . . . make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child. . . . ."

Sect. 4 enables justices in petty session to make an order on the putative father for the maintenance, education, etc., of the bastard child; and if "it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order . . . . such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due . . . . to be recovered by distress and sale of the goods and chattels of such putative father . . . . but if upon the return of such warrant . . . . it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant under their hands and seals, cause such putative father to be committed to the common gaol . . . . for any term not exceeding three calendar months. . . ."

1924

REX v. LANCASHIRE JUSTICES. TYRER, *Ex parte.*

made an order against Thomas Iddon adjudging him to be the putative father of the child, and ordering him to pay the sum of 7*s.* 6*d.* per week for the maintenance and education of the child, and certain other sums for costs and expenses.

Iddon appealed against the order of the justices to quarter sessions. Various grounds were set out in his notice of appeal, but no point was raised as to the jurisdiction of the justices who made the order of February 18, 1924. The appeal was heard on April 9, 1924, and was dismissed, the order of the justices being ratified and confirmed. M. E. Tyrer gave evidence that at the time she took out the summons she lived at Leyland, and that the child was born at Leyland. She was cross-examined as to the truth of these statements, whereupon the chairman said that there was nothing about jurisdiction in the notice of appeal.

Iddon made no payments under the order of February 18, 1924, and on May 26, 1924, the sum of 15*l.* being then in arrear, M. E. Tyrer made a complaint under s. 4 of the Bastardy Laws Amendment Act, 1872, to one of the justices of the petty sessional division of Leyland, who issued a warrant for the apprehension of Iddon and ordered that he be brought before a Court of summary jurisdiction at Leyland to answer the complaint.

On June 2, 1924, the complaint was heard before three justices for the petty sessional division of Leyland (one of whom being the justice to whom M. E. Tyrer had applied for the bastardy summons on January 10, 1924, and another being a member of the bench which heard the summons on February 18, 1924, and made the affiliation order), when M. E. Tyrer gave evidence that 15*l.* arrears were owing by Iddon under the order of February 18, 1924. In the course of her evidence she admitted that the child was born at Heath Charnock, in the petty sessional division of the Hundred of Leyland, and not at Leyland; that she had been living at Heath Charnock for eleven years until three weeks before the birth of the child, when she went for a visit and rest to her sister at Old Crooke Farm, Leyland; that she returned to Heath Charnock three days before the birth of the child;

that fourteen days after the birth of the child she came back to Old Crooke Farm and lived there for a month, and that on January 10, 1924, when she applied for the summons she was living at Old Crooke Farm, but that on the date of the hearing on February 18, 1924, she had gone back to Heath Charnock; that her home had always been in Heath Charnock, and that sometimes she went to Leyland for a visit.

The solicitor for M. E. Tyrer asked the justices to enforce the order of February 18, 1924, against Iddon, as was provided by s. 4 of the Bastardy Laws Amendment Act, 1872.

It was contended on behalf of Iddon that the order of February 18, 1924, was invalid, having been made without jurisdiction, and *Vevers* v. *Mains* (1) was relied upon in support of that contention.

The justices held that M. E. Tyrer at all material times resided at Heath Charnock, outside the jurisdiction of the petty sessional division of Leyland, and that the order had been made without jurisdiction upon untrue evidence given by her as to her place of residence, and was invalid, and they accordingly dismissed the complaint; but they offered to state a case for the opinion of the High Court.

M. E. Tyrer thereupon obtained this rule under s. 5 of the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), on the ground that the justices refused to enforce the order or to hear and determine the said complaint, and that in so refusing the justices (*a*) unlawfully permitted the validity of the affiliation order to be called in question; (*b*) wrongfully held that when she applied for the same she did not reside within the petty sessional division of Leyland; (*c*) unlawfully held the affiliation order was invalid and refused to enforce it, notwithstanding that the order had been confirmed by quarter sessions.

Gilbert Jordan for the justices showed cause. The justices were entitled, when they were asked to enforce the affiliation order, to go behind that order and to inquire whether it was validly made, and as they came to the conclusion that the

(1) (1888) 4 Times L. R. 724.

1924

REX v. LANCASHIRE JUSTICES. TYRER, *Ex parte.*

original affiliation order was made without jurisdiction they were entitled to refuse to enforce it. In *Vevers* v. *Mains* (1) it was held that as the woman resided in another division the magistrates who made the affiliation order had no jurisdiction to make the order, and as the man had been arrested under a warrant to enforce the order a writ of habeas corpus was issued. In the present case the woman Tyrer had been staying with her sister for eight days when she made the application to the justices for the bastardy order against Iddon, and she continued to stay with her sister for twenty days subsequently, but she did not reside there, her home was with her mother six miles away in another petty sessional division. The justices have heard and determined the complaint, and the proper way to challenge the correctness of their decision is by way of case stated: see *Reg.* v. *Wisbech Justices* (2), where Hawkins J. said: "If the magistrates decide wrongly, the remedy is to apply to them to state a case, and not apply for a mandamus, which is both expensive and vexatious." A mandamus will not be granted where there is an equally convenient remedy by way of case stated. In *Reg.* v. *Dayman* (3) the Court discharged a rule calling upon a magistrate to hear and determine a complaint for the non-payment of a certain sum for the paving of a certain street on the ground that the magistrate had heard and determined the complaint, he having refused to make the order.

Roome for Iddon also showed cause. The girl Tyrer did not apply for the bastardy summons to a justice of the peace acting for the petty sessional division of the place in which she resided, as is required by s. 3 of the Bastardy Laws Amendment Act, 1872. "Residence" means the place where a person usually sleeps. When Tyrer applied for the summons she was only on a visit to her sister; she had the intention of returning to her usual place of residence with her mother at Heath Charnock. The justices have found that she did not reside at the address which she gave within their jurisdiction. The woman came to the house of her sister in order to obtain

(1) (1888) 4 Times L. R. 724. (2) (1890) 54 J. P. 743.
(3) (1857) 26 L. J. (M. C.) 128.

a residence fraudulently and so give the justices of that place jurisdiction. It is only when a woman has no settled place of residence that she may make application to the justices of the division in which she may happen to be: *Lawrence* v. *Ingmire*. (1) Where justices dismiss an information on the ground that they have no jurisdiction and at the same time offer to state a case, as was done in the present case, the Court will not grant a mandamus to the justices to hear and determine that complaint: *Ex parte McLeod*. (2) The writ of mandamus is only used where the inferior Courts do not discharge their duty and decline jurisdiction: Short and Mellor's Crown Office Practice, 2nd ed., 198. The powers of justices under s. 4 of the Bastardy Laws Amendment Act, 1872, to enforce payment of sums of money due under a bastardy order are discretionary: *Davies* v. *Evans* (3); *Grocock* v. *Grocock*. (4) Justices have power under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), upon fresh evidence to revoke or vary an order made by a Court of summary jurisdiction for the periodical payment of money.

[*Reg.* v. *Bowman* (5) was also cited.]

Clifford Mortimer in support of the rule. The justices upon the application to enforce the bastardy order were not entitled to consider the question whether the original order was made without jurisdiction; they could not go behind that order and see whether it was properly made. The justices had no discretion about making the distress warrant: *Reg.* v. *Swindon Justices*. (6) An appeal against the original bastardy order was brought to quarter sessions and dismissed, and therefore the justices had no jurisdiction upon an application to enforce the order by distress warrant to question the validity of the order. This is not a case in which there has been an erroneous adjudication; there has been a wrongful refusal on the part of the justices to hear and determine the application, and therefore the rule for a mandamus ought to be made absolute.

(1) (1869) 20 L. T. 391.
(2) (1861) 3 L. T. 700.
(3) (1882) 9 Q. B. D. 238.
(4) [1920] 1 K. B. 1.
(5) [1898] 1 Q. B. 663.
(6) (1878) 42 J. P. 407.

1924

REX v. LANCASHIRE JUSTICES. TYRER, *Ex parte.*

LORD HEWART C.J. It is said in the present case that the justices, having the putative father before them upon a warrant, under s. 4 of the Bastardy Laws Amendment Act, 1872, for the non-payment of sums due under an affiliation order, refused to enter upon the question as to whether they should give the direction which the section contemplates, that is to say, a direction that the sum appearing to be due be recovered by distress, and so forth, and instead permitted themselves to be led into a discussion whether the affiliation order which had been made upon February 18, 1924, was a valid order. Now no doubt under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, provision is made for the review, in proper proceedings and in a proper case, of an order for the payment of money made by a Court of summary jurisdiction. The sub-section provides that "any order made either before or after the commencement of this Act by a Court of summary jurisdiction for the periodical payment of money may, upon cause being shewn upon fresh evidence to the satisfaction of the Court, be revoked, revived, or varied by a subsequent order." No such steps were taken in this case. There had been an appeal by Iddon to quarter sessions against the bastardy order, but the question of jurisdiction was not raised by the notice of appeal. There had been no proceedings commenced by him or upon his behalf to have the bastardy order "revoked, ... or varied by a subsequent order." But when he was in default under the order he sought to meet an application for a distress warrant by attacking the validity of the order upon the question of jurisdiction. With the alleged merits of that question it is not necessary to deal at any length. Under s. 3 of the Bastardy Laws Amendment Act, 1872, the application for a summons, to be served upon the man alleged to be the father of the child, is to be made to a justice of the peace acting for the petty sessional division of the county, or for the city, borough or place in which the mother may reside. The statute does not say "in which her permanent place of abode is"; nor does it say "her most usual place of abode"; but she may apply to a justice of the peace acting for the petty sessional division of the county, or

for the city, borough or place "in which she may reside." It appears from the admitted facts of this case—facts contained in large part in the affidavits now before the Court and supplemented to some extent by the candid and most proper admissions of counsel—that the mother of the bastard child had lived for some time with her mother in a part of Lancashire called Heath Charnock, which is within the petty sessional division of the Hundred of Leyland. But not far away, a distance of some six miles, her married sister had a house, and it had been the habit of this young woman from time to time to visit and stay with that married sister ; and for some time before the birth of this child, and again for some time afterwards, including the time when she made the application for the affiliation summons, a period in all of something like thirty days, she was in fact living in the house of her married sister in the petty sessional division of Leyland. In those circumstances it is, I think, tolerably obvious that she resided in Leyland within the meaning of the law relating to bastardy. Nor is it seriously suggested that she had fraudulently gone upon a visit at that period of the year and in her extremity to her married sister in order that she might obtain, at the hands of the Leyland justices, an order which she apprehended that she might not obtain at the hands of the justices for the Hundred of Leyland. There is not in this case any real suggestion of anything of the kind which is necessary to make the de facto residence of the mother something less than the residence which is required by the bastardy law.

Now what is sought here in those circumstances, the justices having, at that late stage, entertained the question whether the original order was made without jurisdiction, and having therefore refused to enter upon the question whether or no a distress warrant should be directed to be issued, is the remedy provided by s. 5 of the Justices Protection Act, 1848 (11 & 12 Vict. c. 44). It is not necessary that I should read that section. It provides that in a proper case if a justice refuse to do an act, this Court may, by rule, order him to do it, and no action is to be brought against him for doing it. It has been said, and said truly, that in giving effect to the remedy

1924

REX v. LANCASHIRE JUSTICES. TYRER, *Ex parte.*

Lord Hewart C.J.

contemplated by that section this Court acts upon the principles which guide it when it is asked to grant, in the ordinary sense, a writ of mandamus. The circumstances in which this Court will not exercise its discretion to grant a writ of mandamus are sufficiently familiar. As was said by Field J. in *Reg.* v. *Registrar of Joint Stock Companies* (1), "a mandamus ought not to be granted where another remedy is provided, which is not less convenient, beneficial and effectual." It is said that in the present case there was another remedy not less convenient, beneficial and effectual than mandamus or proceedings in lieu of mandamus. That other remedy is said to be an appeal by way of case stated. I pass over the fact that the time has now gone by within which a case might be stated. It is right that the matter should be considered from the point of view of the date at which the appeal by way of case stated was still practicable. Speaking for myself I fail to appreciate how it can be said that an appeal by way of case stated is equally convenient, beneficial and effectual in the particular facts of this case. There is before this Court the whole of the evidence upon the question of the mother's residence at the crucial date. How inconvenient it would be that this matter should come before this Court on some other occasion together with other matters, including findings of fact, the result of which might conceivably be that the real question would not be effectively raised. Reference has been made to *Vevers* v. *Mains* (2), but in that case the objection had been taken that the original order in bastardy was without jurisdiction, and that objection had been overruled upon two grounds, one, because the woman was within the jurisdiction when the order was made, and secondly, because the objection had not been taken when the order was applied for. The warrant accordingly had been issued and the man had been arrested, and a judge in chambers had refused an application for a writ of habeas corpus. The matter then came before this Court. The materials for the decision of the question where the residence of the woman was were to be found in the

(1) (1888) 21 Q. B. D. 131, 135. (2) 4 Times L. R. 724.

affidavits upon the one side and the other. Bowen L.J. said that it was plain that the woman resided in the Penrith Division, and not in the division in which the order was made, and that therefore the magistrates had acted beyond their jurisdiction. Lord Coleridge C.J. expressed himself to the same effect, and in the result a writ of habeas corpus was issued. The Court did not think it right that a case should be stated in order that in proceedings of that kind the matter might be contested. The Court took the materials which were before it, and upon those materials, being satisfied that the original order was made without jurisdiction, granted a writ of habeas corpus. It may well be that in a proper case—and for the reasons which I have mentioned I cannot conceive that this is a proper case—if an order for imprisonment were made founded upon an order granted without jurisdiction, a writ of habeas corpus might be obtained, and that would involve an examination by this Court of the materials upon which the issue of jurisdiction depended.

A case more relevant to the matter now under consideration is *Reg.* v. *Swindon Justices.* (1) In that case a member of a friendly society had become insane and chargeable to the Union, and was sent to the county lunatic asylum. The Guardians applied to the justices under 39 & 40 Vict. c. 61, s. 23, for an order on the trustees to pay out of the arrears of his annuity the cost of his maintenance in relief of the Union. The trustees opposed that order upon the ground, not only that the rules forbade them so to apply their funds, but also that the annuity was needed for the member's family. The justices made the order, but refused to issue a distress warrant. It was held by this Court that the justices were bound to issue the warrant, inasmuch as the trustees ought to have appealed or applied to quash the order, and it was now no defence that the order was invalid or made without jurisdiction. It was suggested in the argument that in cases where the Court had been satisfied on hearing the facts that the order was properly made, the Court would grant the rule as a matter of course.

(1) 42 J. P. 407, 408.

1924

REX v. LANCASHIRE JUSTICES. TYRER, *Ex parte.*

Lord Hewart C.J.

Cockburn C.J., dealing with that argument, said: "I have sat here a long time, but I have never heard of that before. Where an order has been made by a competent authority in a matter within the jurisdiction of that authority, you must give effect to the process of the Court. You cannot go back behind the order to see whether, upon the merits, it was properly made. There are other modes of trying that. You cannot pass by the other matter, and then, in the last stage, propose to rip up the whole inquiry and begin de novo. It would be most inconvenient." Those words, I venture to think, are peculiarly applicable to what is sought to be done by the putative father in the present case. Having had the affiliation order made against him, and having appealed in vain to quarter sessions against the order, and omitted in his notice of appeal to quarter sessions to make a point of the question of jurisdiction, and having thereafter made default in the payments which the affiliation order required him to make, and being brought upon a warrant before the justices in order that a distress might be levied, he proposes to rip up the whole inquiry and begin de novo.

In my opinion these justices did not hear and determine according to law the matter of the complaint under s. 4 of the Act of 1872. They were asked to hear and determine the matter of that complaint. Instead of that, they were led by an unfortunate misuse of the judgment in *Vevers* v. *Mains* (1) into a plan for ripping up the whole inquiry and beginning de novo. I think therefore that on the facts of this case it is plain that this woman resided within the meaning of the bastardy law at the place where she said she resided when she made the application; secondly, that this remedy under s. 5 of the Justices Protection Act, 1848, is, in the circumstances, the appropriate remedy; and thirdly, that the justices upon June 2, 1924, upon the hearing of a complaint that the putative father had made default in his payments, had no jurisdiction to consider the validity of the order which had been made against him on February 18, 1924. For these reasons I think that this rule ought to be made absolute.

(1) 4 Times L. R. 724.

SHEARMAN J. I am of the same opinion. The applicant applied for an affiliation order under the Bastardy Laws Amendment Act, 1872, against the respondent and obtained an order. He appealed against the order to quarter sessions, and the appeal was dismissed. He paid her nothing under the order, and she therefore applied for a warrant and an order to enforce the payment. She went into the witness box to prove she had not been paid anything. Whereupon the following facts were elicited from her in cross-examination: that she had resided with her sister at a spot within the jurisdiction of the magistrates for a week or more before her child was born. She had then gone back again to her mother's home, where she lived regularly, to be confined, and a fortnight after the birth she had gone back to her sister's house, where she lived for a month, and it was during that month's residence that she had taken out the summons before the magistrates in the place in which she was then residing. Counsel for the respondent argued before the magistrates that, on those facts being admitted, the original order was made without jurisdiction. I agree with every word said by the Lord Chief Justice, that that was not a matter which the justices could go into. They can, in rare circumstances on a proper application and on new evidence, rescind an order which they have made or which their predecessors have made. No such application was made in the present case. It was contended that on the facts the justices had no jurisdiction to make the original order, and that it was a piece of waste paper. The justices were, I am afraid, alarmed by a case put before them, and said that they declined to enforce the order. In the result they declined to enter into an inquiry or to use a discretion which by law they were bound to use. They declined to hear the case, and the appropriate remedy is a writ in the nature of a mandamus. Although I agree with the Lord Chief Justice that the justices in those circumstances had no right to enter upon any inquiry as to the validity of the original order, I should be loath to think that such an inquiry cannot be entered upon in the High Court. If upon an application in the nature of a mandamus in the High

1924

REX v. LANCASHIRE JUSTICES. TYRER, *Ex parte.*

Shearman J.

Court, it appears on the admitted and undisputed evidence that the order ought not to have been made, in my opinion the High Court in its general inherent jurisdiction in doing justice might decline to use the discretionary remedy of mandamus. But upon the facts of this case I agree with the Lord Chief Justice that it is perfectly clear that this woman had a residence in the petty sessional division where she made her application within the meaning of the Bastardy Laws Amendment Act, 1872, and that there was no want of jurisdiction in the making of the original order. There were therefore no merits whatever in the objection taken. I agree that this rule must be made absolute.

SALTER J. I agree.

Rule absolute.

Solicitors for the justices: *Vizard, Oldham & Co., for J. Stanton, Chorley.*

Solicitors for Iddon, showing cause: *Walbrook & Hosken, for Brighouse, Jones & Co., Ormskirk.*

Solicitors for Tyrer in support of rule: *W. Sturges & Co., for Smith, Fazackerley & Ashton, Preston.*

R. F. S.

MILLS, APPELLANT *v.* LONDON COUNTY COUNCIL, RESPONDENTS.

1924
[*Nov.* 14.

Cinematograph — Licence — Condition — Ultra vires — Reasonable Condition —Delegation of Powers—Breach of Condition—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *ss.* 2, 3.

The London County Council granted a licence under the Cinematograph Act, 1909, subject to certain conditions, one of which provided: "That no film—other than photographs of current events—which has not been passed for universal exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the Council during the time that any child under or appearing to be under the age of 16 years is therein: Provided that this condition shall not apply in the case of any child who is accompanied by a parent or bona fide adult guardian of such child." The Board was an unofficial body appointed by firms in the film industry for censorship purposes, and formed no constituent part of the Council:—

Held, that as the effect of the condition was to reserve to the Council the right to review the decision of the Board, it was not ultra vires or unreasonable, and further that the condition was not unreasonable and void for uncertainty by reason of the words "child . . . . appearing to be under the age of 16 years" and "accompanied by . . . . a bona fide adult guardian of such child."

Dictum in *Ellis* v. *Dubowski* [1921] 3 K. B. 621 approved and followed.

CASE stated by a Metropolitan police magistrate.

An information was preferred at the Lambeth Police Court by William John Jones on behalf of the London County Council (hereinafter called "the respondents"), under the Cinematograph Act, 1909, against the appellant, Harry Mills, for having allowed certain premises known as The Nelson Electric Theatre, 388 Old Kent Road, Camberwell, of which he was the occupier, to be used in contravention of the conditions upon which a licence relating to the premises was granted to him by the respondents under the statute aforesaid, that is to say, for having in contravention of condition 7 (iv.) of the said licence exhibited without the express consent of the respondents a film entitled "Woman to Woman" not passed for "universal" exhibition by the British Board of Film Censors upon the said premises during the time that a child under or appearing to be under the age of 16 years was therein.

1924

MILLS v. LONDON COUNTY COUNCIL.

The information was heard on June 5, 1924, when the magistrate reserved his decision, and on June 12, 1924, he convicted the appellant.

Upon the hearing of the information the following facts were proved or admitted :—

(*a*) The appellant was the occupier of, and carried on the business of a cinematograph theatre known as The Nelson Electric Theatre at 388 Old Kent Road, in the county of London.

(*b*) The appellant was the holder of a licence under the Cinematograph Act, 1909, granted by the respondents on January 1, 1924. The licence was granted subject to certain terms and conditions, No. 7 (iv.) of which was as follows : "That no film—other than photographs of current events—which has not been passed for universal exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the Council during the time that any child under or appearing to be under the age of 16 years is therein : Provided that this condition shall not apply in the case of any child who is accompanied by a parent or bona fide adult guardian of such child."

(*c*) The British Board of Film Censors was an unofficial body appointed by firms engaged in letting out films on hire to act as censors of the films, and such body formed no constituent part of the respondents, nor did it consult the respondents with regard to the passing or not passing of any film.

(*d*) The British Board of Film Censors had adopted a custom of passing films for "universal" and also for "restrictive" exhibition. Those considered by the Board suitable for universal exhibition were marked "U," and those which were considered by the Board suitable for exhibition to adults but not to children were marked "A."

(*e*) On April 6, 1924, the appellant exhibited at the said theatre a film entitled "Woman to Woman," which to his knowledge had been passed and marked as an "A" film by the Board.

(*f*) The consent of the respondents had not been sought or obtained to such exhibition of the film by the appellant.

(*g*) The film was not indecent and was not in any other way unsuitable for exhibition to children.

(*h*) There were children present under the age of 16 years unaccompanied by a parent or guardian during the exhibition of such film.

It was contended on behalf of the appellant that the condition was ultra vires, unreasonable, and void by reason of vagueness and uncertainty, and that on the above facts the appellant was not in law liable to be convicted.

On behalf of the respondents it was contended that the condition was not ultra vires or unreasonable or vague or uncertain, and that the appellant was liable to be convicted.

The attention of the magistrate was called to *Ellis* v. *Dubowski* (1); *Theatre de Luxe* (*Halifax*), *Ld.* v. *Gledhill* (2); *Rex* v. *Burnley Justices.* (3)

The magistrate, being of opinion that the respondents in framing the said condition of the licence had adopted the form of words suggested by Sankey J. and approved by Lawrence C.J. in *Ellis* v. *Dubowski* (1), convicted the appellant.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination and decision in point of law.

Giveen for the appellant. Condition 7 (iv.) of the conditions under which the licence was granted by the County Council to the appellant is unreasonable and ultra vires, as the County Council delegated their powers with regard to the certifying of films for public exhibition to the British Board of Film Censors, a body which has no statutory authority and which is not connected in any way with the County Council: *Ellis* v. *Dubowski.* (1) The County Council have power under s. 5 of the Cinematograph Act, 1909, to delegate their powers to a committee of the Council or to justices, but they have no

(1) [1921] 3 K. B. 621.
(2) [1915] 2 K. B. 49.
(3) (1916) 85 L. J. (K. B.) 1565; 115 L. T. 525.

1924

MILLS v. LONDON COUNTY COUNCIL.

power to delegate their powers to this extraneous body. It was intended that the County Council should exercise their original judgment in regard to the passing of films for exhibition and not merely act as a Court of Appeal. The fact that the condition contains the words "without the express consent of the Council" does not make the condition good. The dictum of Sankey J. in *Ellis* v. *Dubowski* (1), that if the condition had reserved to the licensing committee the right to review the decisions of the Board the condition would have been valid was unnecessary for the decision of that case, and is wrong. The condition is also void for vagueness and uncertainty, because it speaks of "any child under or appearing to be under the age of 16 years." The question whether a child appears to be under the age of 16 years is a very difficult one to decide. Under that condition it would not be a good defence to prove that a young person was in fact over 16 years of age if he or she appeared to be under that age, and an offence would be committed if the proprietor of the cinematograph went wrong in his deduction as to the age of the young person. The proviso that the condition is not to apply if the child is accompanied by a bona fide adult guardian is ambiguous, and a breach of it might lead to a fine and to the loss of the licence. The only definition of the expression "adult" is contained in s. 49 of the Summary Jurisdiction Act, 1879, where it is defined as "a person who in the opinion of the Court before whom he is brought is of the age of 16 years or upwards." To throw the responsibility of deciding such a question upon the proprietors of cinematographs is quite unreasonable.

[LORD HEWART C.J. In *Kruse* v. *Johnson* (2) Lord Russell of Killowen C.J. said that the by-laws of public representative bodies ought to be supported if possible.]

Mathew J. pointed out in that case (3) that a by-law in order to be valid must contain adequate information as to the duties of those who are to obey, and that it must be reasonable. This condition infringes both those requirements. Pickford L.J.

(1) [1921] 3 K. B. 624. (2) [1898] 2 Q. B. 91, 99.
(3) Ibid. 108.

in *Repton School Governors* v. *Repton Rural Council* (1) said that "if the effect in a given case, which might be of frequent occurrence, of construing a by-law in a particular way would lead to a result quite unnecessary for the protection of the public health, and would impose a serious restriction upon the ordinary rights of a property owner with no good object, I think one would be entitled to say that the by-law was void because it was unreasonable." In *Rex* v. *Burnley Justices* (2) a condition that no film should be shown if it was objected to by three justices in petty sessions was held unreasonable and void. In *Theatre de Luxe* (*Halifax*), *Ld.* v. *Gledhill* (3) a condition in a licence was held bad, because there was no connection between the ground upon which the condition was imposed—namely, regard for the health and welfare of young children generally and the subject matter of the licence, which was the use of the premises for the giving of cinematograph exhibitions. A by-law which is void in part is void altogether, except when the void part can be severed from that which is good, and the latter can be enforced independently: Halsbury's Laws of England, vol. 8, p. 338, and the cases there cited.

[*Ex parte Stott* (4) was also cited.]

Roome for the respondents. Atkin J. dissented from the decision of the Court in the *Halifax* case (3), and Darling J. said in *Rex* v. *Burnley Justices* (5) that he preferred the dissenting judgment of Atkin J. There is however a great distinction between the condition in the *Halifax* case (3) and the condition in the present case. The words in the present condition, "child . . . . appearing to be under the age of 16 years," mean "apparently under the age of 16 years," and create no difficulty. They are already used in various statutes. Sects. 39 and 40 of the Children Act, 1908, deal with selling cigarettes to persons apparently under the age of 16 and the duty of seizing cigarettes in the possession of such persons: see also ss. 57 and 58. The Licensing (Consolidation) Act,

(1) [1918] 2 K. B. 133, 137.
(2) 85 L. J. (K. B.) 1565; 115 L. T. 525.
(3) [1915] 2 K. B. 49.
(4) [1916] 1 K. B. 7.
(5) 85 L. J. (K. B.) 1568; 115 L. T. 529.

1924

MILLS v. LONDON COUNTY COUNCIL.

1910, by s. 67, makes it an offence to supply spirits to any person apparently under the age of 16 years. The Summary Jurisdiction Act, 1879, by s. 49, makes the definition of a child and young person depend upon whether they are "in the opinion of the Court" under the age of 12 or 16. Further, these words can be severed from the rest of the condition, which is good. If a child is in fact over 16 years of age a magistrate would never convict, because it might be said that he was apparently under the age of 16 years. The words in the proviso "accompanied by a . . . . bona fide adult guardian" were inserted to prevent the cinematograph proprietor keeping a person to act as guardian merely as a blind. The proviso provides a defence, and throws the burden of the proof of it upon the defendant, but the words can be severed from the rest of the by-law, because they refer to a defence and not to the proof of the offence. Lord Alverstone C.J. in *London County Council* v. *Bermondsey Bioscope Co.* said (1): "The language of s. 2, sub-s. 1 [of the Cinematograph Act, 1909], seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the County Council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable." This condition is not so vague as to fall within the *Repton* case (2), and it ought to be upheld.

Giveen replied.

LORD HEWART C.J. This is a case stated by one of the Metropolitan police magistrates. An information was preferred by the respondents, the London County Council, under the Cinematograph Act, 1909, against the appellant, for having allowed certain premises to be used in contravention of condition 7 (iv.) of the conditions upon which a licence relating to those premises was granted to him by the respondents under the statute—namely, by exhibiting without the express consent of the respondents a film not passed for universal exhibition by the British Board of Film Censors upon those

(1) [1911] 1 K. B. 445, 451. (2) [1918] 2 K. B. 133.

premises during a time when a child under or appearing to be under the age of 16 years was therein. The magistrate who heard that information convicted the appellant. The question raised by the case stated is whether the particular condition referred to in the information was ultra vires. It is found as a fact that at the time referred to there were children present under the age of 16 years unaccompanied by a parent or guardian during the exhibition of the film. It is further found as a fact that the film which was being exhibited was not a film passed for universal exhibition. It was a film marked "A" to the knowledge of the appellant, and films so marked are films which are considered by the British Board of Film Censors to be suitable for exhibition to grown-up people, but not to children.

The words of the condition are: "That no film—other than photographs of current events—which has not been passed for universal exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the Council during the time that any child under or appearing to be under the age of 16 years is therein: Provided that this condition shall not apply in the case of any child who is accompanied by a parent or bona fide adult guardian of such child." It was urged before the magistrate, and also before us, that that condition in the licence and subject to which the licence was granted was ultra vires, unreasonable, and void by reason of vagueness and uncertainty. The magistrate, having heard the argument, upheld the condition and decided against those contentions. The question is whether the magistrate was right in upholding the condition.

It is important to remember that under the Cinematograph Act, 1909, the licensing authority is given, and no doubt most deliberately given, very wide powers. Sect. 2, sub-s. 1, provides as follows: "A County Council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid"—that is for the purposes of cinematograph exhibitions—"on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the Council may by the respective

1924

MILLS v. LONDON COUNTY COUNCIL.

Lord Hewart C.J.

licences determine." As was said by Lord Alverstone C.J. in *London County Council* v. *Bermondsey Bioscope Co., Ld.* (1): "The language of s. 2, sub-s. 1, seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the County Council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable." I think it is pertinent with reference to this subject matter, in view of the wide words that are employed in that sub-section, to refer to the observations of Lord Russell C.J. in *Kruse* v. *Johnson* (2), where he was dealing with the cognate subject of by-laws made by public representative bodies. He there said: "When the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction."

In the present case the criticism which is directed against this condition by Mr. Giveen with a high degree of ingenuity aims at three points. It is said, first of all, that this condition is bad, because it means that the London County Council have delegated, or transferred, to the British Board of Film Censors no small part of the duties of the London County Council under the Act, and reference is made to *Ellis* v. *Dubowski*. (3) In that case the condition which was attached to the licence was in these terms: "That no film be shewn . . . . which has not been certified for public exhibition by the British Board of Film Censors." It was held with some doubt that that condition was unreasonable and ultra vires. Avory J., for example, spoke (4) of the considerable doubt and hesitation

(1) [1911] 1 K. B. 445, 451.
(2) [1898] 2 Q. B. 91, 99.
(3) [1921] 3 K. B. 621.
(4) [1921] 3 K. B. 626.

which he had in holding that the condition was so unreasonable as to be ultra vires the licensing authorities. But one thing was made very plain by that Court, both in the course of the argument and also in the judgment, that different considerations would have applied if the condition had been so framed as to make the certificate or the decision of the British Board of Film Censors not final, but subject to review. It was said, for example, by Lawrence C.J. (as he then was) (1): "If, as was suggested by Sankey J. in the course of the argument, the condition had reserved to the Committee the right to review the decisions of the Board, it would seem to be a reasonable condition. Upon that Mr. Giveen's answer did not convince me; for it is reasonable that no film should be shewn which has not been passed by some body. But that body should not be made the final dictator, and a condition putting the matter into the hands of a third person or body not possessed of statutory or constitutional authority is ultra vires the Committee." In the present case that mischief is avoided. This condition with which we are now concerned provides an exception where the express consent of the Council is given. In other words. there is an appeal in the matter from the decision of the British Board of Film Censors to the Council itself. In my opinion, therefore, the first objection fails.

But it is further said that this condition is unreasonable because it is vague, and it is under that head that the remaining two criticisms fall. The first is directed to the words: "Any child under or appearing to be under the age of 16 years." The second criticism is directed to the words: "accompanied by a parent or bona fide adult guardian." The words "under or appearing to be under the age of 16 years" seem at first sight to be a little unusual, but when one looks at the Children Act, 1908, which was passed in the year before the year in which the Cinematograph Act was passed, it appears that s. 39 of that Act makes it an offence to sell cigarettes to a person "apparently under the age of 16 years." In like manner it is provided by s. 67 of the Licensing (Consolidation)

(1) [1921] 3 K. B. 625.

1924

MILLS v. LONDON COUNTY COUNCIL.

Lord Hewart C.J.

Act, 1910, that "the holder of a justices' on-licence shall not sell or allow any person to sell, to be consumed on the premises, any description of spirits to any person apparently under the age of 16 years." There is no difference, except in spelling, between "apparently" and "appearing to be." What then is the mischief which is aimed at by the Legislature in such phrases? Is it not clearly this, that in order to prevent that from being done which the Legislature desires to prevent, it throws a somewhat unusual burden upon the alleged offender. But if a case arose under the condition with which we are now dealing, where the child referred to was said to be apparently under the age of 16 years, I cannot imagine that a tribunal would convict if it appeared upon examination that in fact the child was over 16. Mr. Giveen however says that under this condition, as contrasted with the provisions of certain sections of the Children Act, 1908, and s. 67 of the Licensing (Consolidation) Act, 1910, the defendant may be hit either way, because it is enough, in order that the condition should be broken, that a child should be present who is in fact under or appears to be under the age of 16 years. Recollecting the subject matter with which one is concerned —namely, the exhibition of photographs which a Board of Film Censors thinks to be not fit for children, though fit for adults—I see no difficulty at all in regarding that cumulative test as reasonable, although, as I said a moment ago by anticipation, I cannot myself imagine that if it was shown that in fact the child referred to was over the age of 16 years the fact that he appeared to be under that age would be fatal to the defendant. I do not think therefore that these words: "any child under or appearing to be under the age of 16 years," or translating them into the language of the statutes: "any child under or apparently under the age of 16 years," incorporated as they are in the condition, make the condition so vague as to be unreasonable. The same observation applies to the criticism directed against the words "bona fide adult guardian." It is quite easy to see that in particular circumstances, and especially in a case where it was thought that trouble was about to arise, a person might be put forward, or

might falsely put himself forward, as being the guardian of the child referred to when in fact he was not the guardian of the child; and it is not likely to pass the wit of any tribunal which may have to deal with such a matter to determine, aye or no, whether the person, under whose wing protection in a particular case is sought, does or does not come within the category of bona fide adult guardian. The argument which has been put forward per contra is, as I have said, an attractive argument, but I think that this condition, looking at the wide words of the statute and at the purpose of the condition, ought to be supported if it can reasonably be supported. In my opinion it can reasonably be supported. For these reasons I think that the magistrate came to the right conclusion and that this appeal fails.

SHEARMAN J. I am of the same opinion. This condition is attacked as a whole, and in my opinion the most important part that has been attacked and said to be bad is that part of it which says that no film which has not been passed for universal exhibition by the British Board of Film Censors shall be exhibited on the premises without the express consent of the Council during certain times. Mr. Giveen argued that that condition was unreasonable and ultra vires, because it was an improper delegation of the powers of the London County Council to the Board of Film Censors, a body which was not appointed by the County Council and which really represented a diverse interest. In my opinion it is not open to us to listen to that argument. A somewhat similar condition was considered in *Ellis* v. *Dubowski* (1), but that condition did not contain the words "without the express consent of the Council." Mr. Giveen, who also appeared in that case, put up the argument that there had been an illegal delegation of powers by the Licensing Committee of the County Council and that the condition was unreasonable on that ground. The Divisional Court held that that particular condition was ultra vires and unreasonable, not because certain powers had been delegated to this extraneous body, but

(1) [1921] 3 K. B. 621.

1924

MILLS v. LONDON COUNTY COUNCIL.

Shearman J.

because the decision of that extraneous body had been made final and unappealable. That is quite clear from the judgments of all three judges. In the result the argument that the mere fact that the delegation was to an alien body made the condition bad was rejected by the three judges who heard that case, although in fact they decided that the condition was bad, because it left no discretion at all of any kind to the committee; and two of the judges expressly went on to say that if it had contained substantially the very words that are in the condition that we are at present considering, they would have been of a different opinion. It was urged upon us that the statements to that effect of the judges who decided *Ellis* v. *Dubowski* (1) were not decisions, but only dicta. The practice, as I understand it, is, that when one judge expresses an opinion which is not necessary to the judgment it may be regarded with respect in another case, but it may also be disregarded by judges who disagree with it. But when all three judges, in a case which is argued at length, reject a particular argument and all give the grounds of their decision, intimating that they see nothing wrong in a particular delegation of powers, it would not be seemly for this Court, even if it wanted to do so, to reconsider that decision and to say that the particular delegation of power is bad, and thus introduce a chaotic result with regard to the administration of conditions of this nature. I am not expressing any disapproval of the decision or the dicta in that case; to my mind they were dicta on which the decision was given unanimously by the three judges, and therefore we ought to follow them.

As to the remaining points which have been dealt with at length by the Lord Chief Justice, I agree with him entirely that there is nothing unreasonable in putting in the words "during the time that any child under or appearing to be under the age of 16 years is therein," because it is quite common to find contemporary legislation treating as a thing to be prohibited not only a sale to persons actually under a particular age, but also a sale to persons appearing to be or apparently under that age. I think there is still less force in

(1) [1921] 3 K. B. 621.

the contention that it is unreasonable to speak of a "bona fide adult guardian." I think the words "accompanied by a bona fide adult guardian" mean accompanied by a real or true guardian of the child, and I see nothing unreasonable in that provision. In the result in my judgment the whole of this condition is reasonable and enforceable, and therefore the conviction was good.

SALTER J. I agree. As to the second point, apparent age is a standard already applied in the statute relating to children, and there is nothing oppressive or unreasonable in making the condition apply both to persons under the age of 16 years and to persons apparently under that age.

Appeal dismissed.

Solicitors for appellant: *Norman Hart & Mitchell.*
Solicitor for respondents: *D. P. Andrews.*

R. F. S.

RODBOURN, APPELLANT *v.* HUDSON, RESPONDENT.

1924
Oct. 21, 22; *Nov.* 19.

Adulteration—Rum—Dilution—Sale to the Prejudice of Purchaser—Sufficiency of Notice—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Licensing Act,* 1921 (11 & 12 *Geo.* 5, *c.* 42), *s.* 10.

The appellant, the licensee of a public-house, was asked by a purchaser for one and a half quarterns of rum. The appellant supplied the rum from a bottle which had no label on it, but which was in the bar where the purchaser saw and read a notice in these terms: "All spirits sold at this establishment are of the same superior quality as heretofore, but to meet the requirements of the Sale of Food and Drugs Acts they are now sold as diluted spirits. No alcoholic strength guaranteed." Nothing was said at the time about the strength of the rum, which on analysis was found to be 41½ degrees under proof. In a prosecution of the appellant for selling the rum to the prejudice of the purchaser, the justices were of opinion that the above notice was ambiguous and did not convey to the mind of the purchaser the fact that when he asked for rum he was supplied with spirits so diluted as to reduce the strength below the minimum specified in s. 10 of the Licensing Act, 1921, and they therefore found that the sale was to the prejudice of the purchaser, and convicted the appellant:—

1924

RODBOURN v. HUDSON.

Held, that the notice was misleading, and that the justices were entitled to find that the sale was to the prejudice of the purchaser.

Gage v. *Elsey* (1883) 10 Q. B. D. 518 and *Brander* v. *Kinnear* 1923 S. C. (J.) 42 considered.

CASE stated by Hampstead justices.

The appellant was summoned for having sold rum which was not of the nature, substance and quality demanded by the respondent as purchaser.

On January 16, 1924, one Stratton went with the respondent (an inspector under the Sale of Food and Drugs Acts) to the appellant's public-house. Stratton, acting on the instructions of the respondent (who remained outside), went into the bar, where he saw and read a notice in these terms: "All spirits sold at this establishment are of the same superior quality as heretofore, but to meet the requirements of the Sale of Food and Drugs Acts they are now sold as diluted spirits. No alcoholic strength guaranteed." He asked the appellant for, and was supplied with, one and a half quarterns of rum in two bottles, being charged therefor and paying 3*s*. 9*d*. for the rum and 4*d*. for the bottles. The rum was served from a bottle which had no label on it, and which was on a shelf in the bar. After the rum was supplied to Stratton the respondent entered the bar, where he saw the said notice; and he informed the appellant that the rum had been purchased for analysis. The respondent duly complied with the requirements of the Acts. Nothing was said by any of the three about the strength of the rum. On analysis the rum was found to be 41½ degrees under proof.

For the appellant it was contended that the case was covered by *Gage* v. *Elsey* (1); that s. 10 of the Licensing Act, 1921 (2), merely afforded a statutory defence, and did not affect the defence on the principle laid down in *Gage* v. *Elsey* (1), and that there was no sale to the prejudice of the purchaser.

(1) 10 Q. B. D. 518.

(2) Licensing Act, 1921, s. 10: "In determining whether an offence has been committed under the enactments relating to the sale of food and drugs by selling to the prejudice of the purchaser whisky, brandy, rum or gin not adulterated otherwise than by any admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than thirty-five degrees under proof. . . . ."

1924

RODBOURN v. HUDSON.

For the respondent it was contended that Stratton was prejudiced by the sale to him of rum diluted to the extent mentioned; and that the notice was equivocal, ambiguous and misleading, and not such as would bring to the mind of the purchaser the character of the article supplied or secure his consent to accept an article other than rum of the minimum strength specified in s. 10 of the Licensing Act, 1921.

The justices were of opinion that the notice was ambiguous, and did not convey to the mind of the purchaser the fact that when he asked for rum he was supplied with spirits so diluted as to reduce the strength below the limit of 35 degrees under proof, and they held that the sale was to the prejudice of the purchaser and convicted the appellant. The question was, whether they were right in law in so holding.

Whiteley K.C. and *Roland Burrows* for the appellant. Where, as was the case here, a purchaser is informed or knows at the time of his purchase that the article he is buying is a diluted article he cannot say that he is prejudiced. Knowledge of the fact of dilution may be brought to the purchaser's mind, not only by a label under s. 8 of the Sale of Food and Drugs Act, 1875, but by a notice such as was given in this case: *Sandys* v. *Small.* (1) This notice is identical in terms with that given in *Gage* v. *Elsey* (2) and *Palmer* v. *Tyler* (3), and there it was held a good defence.

[LORD HEWART C.J. May a licensee under this notice sell spirits which he or his agent with his consent has diluted to the extent of, say, 60 per cent.?]

In such a case it would be open to the justices to find that what was sold was water, rather than spirits. In *Spiers and Pond* v. *Bennett* (4) it was held that the precise amount of abstraction of cream from milk need not be disclosed provided that notice of the alteration was given, nor is it necessary to state in the notice the exact amount of dilution: *Williams* v. *Friend* (5); and, indeed, in view of s. 10 of the Licensing Act,

(1) (1878) 3 Q. B. D. 449.
(2) 10 Q. B. D. 518.
(3) (1897) 61 J. P. 389.
(4) [1896] 2 Q. B. 65.
(5) [1912] 2 K. B. 471.

1924

RODBOURN v. HUDSON.

1921, it is submitted that it is only necessary to give notice when the dilution is to a greater extent than 35 degrees under proof.

[They also referred to *Morris* v. *Johnson* (1); *Morris* v. *Askew* (2); *Pearks, Gunston & Tee* v. *Houghton* (3); and *Dawes* v. *Wilkinson.* (4)]

Singleton K.C. and *S. G. Turner* for the respondent. If a person sells spirits diluted to more than 35 degrees under proof it is incumbent upon him to give notice to the purchaser. That in effect was decided in *Sandys* v. *Small.* (5) Having regard to the terms of this notice, it cannot be said that a purchaser must know that dilution to a greater extent than 35 degrees has taken place. The reassuring statement with which it commences certainly does not point to the fact of such a dilution. Neither in *Gage* v. *Elsey* (6) nor in *Palmer* v. *Tyler* (7) was the sufficiency of the terms of the notice discussed. In the Scottish case of *Brander* v. *Kinnear* (8) it was said that the notice, to be effectual, must clearly and unambiguously acquaint purchasers not only with the fact but also with the character of the prejudice they are asked to accept. This notice certainly does not satisfy that test.

Whiteley K.C. in reply. The sufficiency of the notice must have been considered in *Gage* v. *Elsey.* (6)

[LORD HEWART C.J. I can find no criticism directed to the phraseology of the notice. It was not brought to the attention of the Court.]

The notice is not ambiguous; the first words only mean that a purchaser buying spirits will get the same quality as he always had been supplied with in the appellant's house. The Scottish case of *Brander* v. *Kinnear* (8) is not a binding authority and cannot be reconciled with *Gage* v. *Elsey.* (6)

Cur. adv. vult.

NOV. 19. LORD HEWART C.J. read his judgment, which, after stating the facts, continued: In the course of the

(1) (1890) 54 J. P. 612.
(2) (1893) 57 J. P. 724.
(3) [1902] 1 K. B. 889.
(4) [1907] 1 K. B. 278.
(5) (1878) 3 Q. B. D. 449.
(6) 10 Q. B. D. 518.
(7) (1897) 61 J. P. 389.
(8) 1923 S. C. (J.) 42.

argument before this Court many cases were cited, but before I consider them it is important to see what exactly is the question that has to be here decided. The justices have found that in fact the sale was to the prejudice of the purchaser for the reasons which they have given, and unless this Court can say that there was no evidence upon which they could properly so find we cannot disturb their decision. The question, therefore, is whether it can be said that a purchaser who had read this notice could not possibly be prejudiced by the sale of spirits reduced by dilution below the minimum statutory strength.

The earliest case that was cited was *Sandys* v. *Small* (1), decided in 1878. In that case there had been a sale of whisky mixed with water and 30 degrees under proof, and it was proved that notices were posted in conspicuous places in the bar and in every other room in the house ordinarily used by the seller for the purpose of his business, as follows: "All spirits sold here are mixed—38 & 39 Victoria, chapter 63, ss. 8 and 9." The justices dismissed an information under s. 6 of the Sale of Food and Drugs Act, 1875, and the question for the opinion of the Court was whether the posting of the notice was equivalent to a declaration by the seller that the whisky sold was not of the nature, substance and quality of the article demanded by the purchaser. The appellant contended that the only way in which a seller could protect himself in such a case was by giving a label to the purchaser in accordance with s. 8 of the Act. In delivering judgment dismissing the appeal Cockburn C.J. said (2): "I should be very sorry to diminish the efficacy of a very useful Act, intended to protect the public from frauds committed by the sellers of the articles to which the Act relates, but we ought, if possible, to construe the words of the Act so as not to interfere with due freedom of dealing between the seller and the purchaser, and not unfairly to prejudice either party. I think we should be doing so if we held its provisions to apply to cases such as the present, where both parties perfectly well know what they are dealing with." He went on to say that the provisions

(1) (1878) 3 Q. B. D. 449. (2) 3 Q. B. D. 452.

1924

RODBOURN v. HUDSON.

Lord Hewart C.J.

of s. 6 applied to "cases where a seller professes to sell to the purchaser an article as being of a certain denomination, whereas the article has been altered by an admixture of some other ingredient, and it seems that when the article is so altered, this must be considered to have been done 'to the prejudice of the purchaser,' unless it is duly and sufficiently brought to his knowledge." It is clear that the foundation of the decision, both in the Court below and on appeal, was that the purchaser was fully aware of the nature of the article that was being supplied to him. There was no argument upon the question what "due and sufficient" notice was.

In *Gage* v. *Elsey* (1), the case mainly relied upon by the present appellant, the notice, to which the purchaser's attention had been specially directed, was in substantially the same terms as those of the notice in the present case, and the Court quashed a conviction of the defendant for having sold gin 40½ degrees under proof. But the only point which appears to have been argued, and which was dealt with in the judgments, was whether the fact that s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879, had provided that "in determining whether an offence has been committed under s. 6 of the said Act [that is, the Act of 1875] by selling, to the prejudice of the purchaser, spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than . . . . 35 degrees under proof for gin" deprived the seller of his defence, on the authority of *Sandys* v. *Small* (2), that the sale was not to the prejudice of the purchaser. It appears to have been assumed that knowledge had been brought home to the purchaser that the spirit had been diluted beyond the statutory limit, and the sufficiency of the notice in this respect does not seem to have been discussed. I cannot, therefore, regard this decision as an authority upon the sufficiency of the notice.

The case of *Morris* v. *Johnson* (3) turned on the point, had the justices made sufficient inquiry into the question whether

(1) 10 Q. B. D. 518. (2) 3 Q. B. D. 449.
(3) 54 J. P. 612.

the purchaser knew that the spirits were sold as diluted, and the case was remitted to them for a finding on this question. The only importance of that case for the present purpose is that the question as to the knowledge of the purchaser was evidently treated as a question of fact for the justices.

In *Morris* v. *Askew* (1) a notice was exhibited stating that "All spirits sold here are diluted in accordance with the new excise regulations." The purchaser having asked for rum, the seller said that he had two qualities, one at 1*s.* and one at 1*s.* 2*d.* per half pint, and the 1*s.* quality was purchased. It was found to be 38 degrees under proof. The justices having dismissed the information, it was held that they were wrong, the mere notice not being of itself a protection to the seller, and that they should have determined whether the purchaser was in fact prejudiced. In other words, it was held that the function of the justices was to decide whether the necessary information had in fact been conveyed to the purchaser.

The case of *Spiers and Pond* v. *Bennett* (2) was a case of deficiency of cream in milk, and the prosecution was under s. 9 of the Act of 1875 for altering the milk by abstraction of cream without making disclosure of the alteration. The question was whether sufficient disclosure had been made. I do not think that the decision helps us in the present case.

In *Palmer* v. *Tyler* (3) there was a notice in substantially the same terms as those of the notice in the present case, and a sale of rum diluted so as to reduce the strength to 29·4 degrees under proof. The justices found as facts that it was brought to the knowledge of the purchaser that the rum sold was diluted, and that the sale was not to the prejudice of the purchaser. But they convicted the seller, because no label had been supplied as provided by s. 8 of the Act of 1875. On appeal it was admitted by counsel for the respondent that the conviction could not be supported, the finding of fact that the sale was not to the prejudice of the purchaser being conclusive. It is to be observed that Mr. Channell Q.C. (as he then was) in argument for the appellant contended, and

(1) 57 J. P. 724. (2) [1896] 2 Q. B. 65.
(3) 61 J. P. 389.

1924

RODBOURN v. HUDSON.

Lord Hewart C.J.

contended with success, that the justices had found in terms that the sale was not to the prejudice of the purchaser, and that that question was a question of fact.

The decision in *Pearks, Gunston & Tee* v. *Houghton* (1), a case of excessive moisture in butter, was based on the fact that what was sold was, to the knowledge of the purchaser, not "butter," but "blended butter," and here again I do not think that the decision helps us.

In *Dawes* v. *Wilkinson* (2) the notice relied upon was in the terms following: "All spirits sold in this establishment are of the same quality and strength as heretofore, but in order to comply with the Food and Drugs Act will not be of any guaranteed strength." The rum sold contained 3·7 parts of added water. The justices convicted on the ground that the notice did not use the word "diluted" and was, therefore, insufficient to protect the seller, and this decision was upheld on appeal. In his judgment Ridley J. said (3): "The notice in this case may mean anything or nothing. It does not bring to the mind of the purchaser that anything has been done to reduce the article by dilution below the standard. . . . . In my opinion, in order to protect himself from conviction the seller must give a notice such as to tell the purchaser the fact that there has been such a tampering with the spirit as is expressed by the word 'dilution.'"

The case of *Williams* v. *Friend* (4) does not, in my opinion, throw any light on the question we have to determine.

In the Scottish case of *Brander* v. *Kinnear* (5) it was held by the Court of Justiciary that a notice that "All spirits sold in this establishment are diluted. No strength guaranteed," was not sufficient to protect a seller who, when asked for whisky, supplied whisky watered to such an extent as to reduce the strength below the statutory minimum of 35 degrees under proof. It was laid down that in order to be effectual the notice must be clear and unambiguous, and such as to acquaint purchasers not only with the fact, but also with

(1) [1902] 1 K. B. 889.
(2) [1907] 1 K. B. 278.
(3) 1 K. B. 283.
(4) [1912] 2 K. B. 471.
(5) 1923 S. C. (J.) 42.

the character, of the prejudice they are asked to accept. The decision was unanimous, and though not binding upon us, is entitled to great respect. In that case, it is to be observed, the notice was evidently more simple and direct than the notice in the present case.

In *Taylor* v. *Elder* (1) the appellant was convicted for selling to the prejudice of the purchaser rum which was 46·14 degrees under proof, and an appeal from the conviction to quarter sessions was dismissed subject to a special case. A notice that "All spirits sold here are of the same superior quality as heretofore, but to meet the requirements of the Licensing Act, 1921, and the Sale of Food and Drugs Act, they are now sold as diluted spirits, no alcoholic strength being guaranteed," was exhibited in the bar, but it was found by the justices that the purchaser had not seen or had his attention called to the notice and that the sale was to his prejudice. It was held that there were materials upon which the justices could find as they did, and that the Court of quarter sessions was right in dismissing the appeal. In that case I expressed the opinion, to which I adhere, that the notice was a notice of grave and calculated ambiguity.

In my opinion, the notice in the present case—substantially the same notice—is both ambiguous and misleading. It starts by saying that all spirits sold are of superior quality, and then goes on to say that to meet the requirements of the Food and Drugs Acts they are sold as diluted spirits, no alcoholic strength being guaranteed. The term "superior quality" is, in my opinion, a misleading term to apply to spirits which have been reduced by dilution to a strength lower than the statutory minimum of 35 degrees under proof; and there is no provision in the Food and Drugs Acts requiring any one to sell spirits, whether of superior or inferior quality, as diluted spirits. As to the words "no alcoholic strength guaranteed," they might well be understood to mean merely that the spirits are not guaranteed to be of any particular strength above the statutory minimum.

One illustration may be offered, exempli gratia, to show how

(1) (1923) Brewing Trade Review, vol. xxxvii., p. 218; 1923, B. T. Rep. 36.

1924

RODBOURN v. HUDSON.

Lord Hewart C.J.

misleading such a notice might be. It was actually urged, deliberately and repeatedly, in the course of the argument on behalf of the appellant in the present case, that under the protection of this notice a licensee, notwithstanding the intentionally reassuring words with which his notice begins, might himself deliberately water the spirits he was about to sell, and water them to the utmost limit at which he could escape a finding that what he was selling was really water. That argument seems to me to be most useful. It is of the nature of a convincing reductio ad absurdum. Certainly in any case in which the justices had before them evidence of any such fraud it would, in my opinion, be their duty to find that the purchaser was prejudiced. In this case it rested on the seller to prove that such notice was given as that the sale was not to the prejudice of the purchaser. As was said by Cockburn C.J. in *Sandys* v. *Small* (1): "When the article is so altered, this must be considered to have been done 'to the prejudice of the purchaser' unless it is duly and sufficiently brought to his knowledge." There are therefore two questions: (1.) What is the substance of the information which must be given to the purchaser? (2.) Were the steps taken sufficient, in all the circumstances, to convey this information to an average purchaser? (If the particular purchaser does not see, and is not made aware of the notice, obviously the question of its sufficiency does not arise: see *Preston* v. *Grant*. (2)) The first of the foregoing questions is a question of law, the second is a question of fact. As to (1.), the purchaser must be told in substance that the thing which he is getting is not the thing he asked for. As to (2.), the question is whether the notice is in such terms as would bring the required information to the mind of an average customer. In other words, the actual sufficiency of the notice is a question for the justices. The difficulty in some of the reported cases is that questions (1.) and (2.) may seem sometimes to have been a little confounded. No doubt, if the notice, properly construed, could not convey the necessary information the justices would be wrong in law to acquit. In this case, there is no reason to

(1) 3 Q. B. D. 449, 452. (2) Ante, p. 177.

think that the justices adopted a wrong standard of the information which was necessary. Whether this notice would convey that information to the average customer was entirely for them, if there was evidence. There was evidence on which they could find that it would not. The saying that "everyone is supposed to know the law" is too general. The maxim is "Ignorantia legis neminem excusat." It cannot be accepted as a defence against a charge of breach of the law. But in considering this notice the justices would properly remember that the average customer probably knows nothing of the Food and Drugs Acts. The notice is consistent with the view that, by reason of new legislation, the spirits must be sold under a new style—"sold as diluted spirits"—but would really be of the same quality as before. It would, I think, be unfortunate if a form of notice could be hall-marked by the Courts, so that any seller could evade the Act by hanging the notice up. To repeat a phrase used in the argument in the present case, it is not possible for the Court to "pass" a form of notice, because the sufficiency of the notice in the circumstances of the case is for the justices in each case.

I am of opinion, therefore, that there was evidence here to justify the finding of the justices that the sale was to the prejudice of the purchaser, and that this appeal must be dismissed. I may add that, in my opinion, this decision is not in real conflict, upon a true analysis, with any of the authorities which have been cited.

AVORY J. I entertain grave doubt whether the judgment in this case can be reconciled with the decision of the Court in *Gage* v. *Elsey* (1), which has been acted upon since 1883, and I am not prepared to assent to what I understand to be the effect of the judgments in the Scottish case, *Brander* v. *Kinnear* (2)—namely, that the seller is not protected unless the notice specifies the actual extent of the dilution, but, subject to these reservations, I do not dissent from the judgment of my Lord and Salter J. that there was in this

(1) 10 Q. B. D. 518. (2) 1923 S. C. (J.) 42.

1924

RODBOURN v. HUDSON.

case evidence upon which the justices could find as a fact that the sale was to the prejudice of the purchaser.

SALTER J. I agree entirely with the judgment which my Lord has delivered, and for the reasons he has given. I do not desire to add anything.

Appeal dismissed.

Solicitors for appellant: *Maitland, Peckham, Washington Fox & Hatten.*

Solicitor for respondent: *A. P. Johnson.*

J. S. H.

K. B. D. 1924
Oct. 14, 17.
C. A.
Nov. 18, 19, 20.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THORNELY *v.* LORD LECONFIELD AND ANOTHER.

[1924. T. 963.]

Clerk of the Peace—Clerk appointed after 1888—*Tenure of Appointment—Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 83, 118.

A person appointed since the passing of the Local Government Act, 1888, to the office of Clerk of the Peace of a county has by virtue of his appointment an office for life, subject to his good behaviour. If he be appointed upon condition that he shall be dismissible at a stipulated notice the condition is void, but the appointment remains good.

ACTION tried by Swift J.

The following statement of facts is taken from the judgment:—

"On November 14, 1913, the plaintiff, Samuel Thornely, a solicitor of the Supreme Court and up to that time the Clerk of the Peace for the county of Worcester, was appointed to the offices of Clerk of the Peace and Clerk to the County Council of the administrative county of West Sussex by the Standing Joint Committee of that county. By the resolution which appointed him, the terms of which had been communicated to Mr. Thornely before he applied for the position and which were well known to him when he accepted the

appointment, it was provided that the appointment should be terminable, the resolution stating that the appointment was subject to conditions, which included: '(3.) Six months' notice shall be given on either side to determine the appointment.'

"On May 23, 1924, the Standing Joint Committee gave to the plaintiff a notice in writing, whereby they purported to determine the plaintiff's tenure of his said offices as Clerk of the Peace and Clerk to the County Council as from December 26, 1924. The plaintiff thereupon brought this action, claiming a declaration that the tenure of his offices as Clerk of the Peace and Clerk to the County Council of West Sussex is a tenure for so long time as he shall well demean himself in his said office and that he cannot be removed therefrom save for misdemeanour charged and proved in accordance with the statutes in that behalf made and provided, and that the notice in writing given by the Standing Joint Committee and dated May 23, 1924, is ineffective to determine his tenure of the said offices, and he also asks for an injunction to restrain the Standing Joint Committee from treating those offices as vacant."

Lilley for the plaintiff. 37 Hen. 8, c. 1, enacted that the Custos Rotulorum should appoint the Clerk of the Peace, who should hold and enjoy his office "during the time that the said Custos Rotulorum shall occupy and exercise the foresaid office of Custos Rotulorum, so that the said Clerk demean himself in the said office justly and honestly"; but the tenure of the office of Clerk of the Peace was altered by 1 Wm. & M. c. 21, which by s. 5 provided that "the Custos Rotulorum, or other person, to whom of right it doth or shall belong to nominate or appoint the Clerk of the Peace for any county . . . . shall, from time to time, where the office of the Clerk of the Peace now is, or hereafter shall be void, nominate and appoint one able and sufficient person residing in the said county . . . . for which he is so appointed or to be appointed Clerk of the Peace, to execute the same by himself or his sufficient deputy, and to take and receive the fees, profits,

1924

THORNELY v. [LORD LECONFIELD.

and perquisites thereof, for so long time only as such Clerk of the Peace shall well demean himself in his said office." Sect. 6 enacted that if a Clerk of the Peace should misdemean himself in the execution of his office, "and a complaint and charge in writing of such misdemeanour shall be exhibited against him to the justices of the peace in their general quarter sessions, it shall be lawful for the said justices, or the major part of them, from time to time, upon examination and due proof thereof, openly in their said general quarter sessions, to suspend or discharge him from the said office," in which case the Custos Rotulorum was to nominate and appoint another. On that statute it was decided in *Harcourt* v. *Fox* (1) that a Clerk of the Peace had an estate for life in his office. It is true that in *Rex et Reg.* v. *Owen* (2), where a Clerk of the Peace was appointed "during the pleasure of the Custos" it was held that, on his being deprived, the Court would not grant a mandamus to restore him, for the appointment being void he could not show a title to the office.

[SWIFT J. If that case is a binding authority, the present plaintiff never had the office of Clerk of the Peace.]

That is so; but it is submitted that the case was wrongly decided.

[*Macmorran K.C.* for the defendants. We do not dispute that under 1 Wm. & M. c. 21 the Clerk of the Peace had an estate for life in his office; what we say is that the position was completely altered by the Local Government Act, 1888.]

The Act of 1888 has not altered the tenure of the office of Clerk of the Peace. By s. 3 of that statute the administrative business of counties was transferred from quarter sessions to the newly constituted county councils, who were empowered to appoint and remove certain officials "other than the Clerk of the Peace and the clerks to justices." Sect. 30 provided for the appointment of a Standing Joint Committee of quarter sessions and the county council, to which committee were to be referred all matters arising under the Act with respect to the police or the Clerk of the Peace and other officers who served both quarter sessions and the county council.

(1) (1692–3) Show. 426, 506. (2) (1694) 4 Mod. 293.

But that committee cannot exercise any of the powers of a court of record or perform any judicial business: see s. 78, sub-s. 2. Reliance will no doubt be placed by the defendants on ss. 83 and 118 (1), but it is submitted that they have not the effect sought to be attributed to them. By s. 83 the appointing and removing authority is now the Standing Joint Committee, but the terms on which the appointment can be made, and the grounds upon which the removal can be effected, are precisely the same as before, so that it cannot be made a term of the appointment that the office can be terminated by giving notice. Sect. 83, sub-s. 4, expressly empowers the Standing Joint Committee to appoint a deputy clerk "to hold office during their pleasure." There is no similar provision with regard to the appointment of the Clerk of the Peace, and in the absence of express words Parliament cannot have intended to alter the tenure of an ancient office. In *Garnett* v. *Bradley* (2) Lord Blackburn said: "There is another rule which has been laid down, which, I think, is a good rule if it is properly applied, namely, that where there has been a particular rule established either by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words

(1) Local Government Act, 1888, s. 83: "Subject to the provisions of this Act for the protection of clerks of the peace holding office at the passing of this Act, the following provisions shall have effect:—

(1.) The clerk of the peace of a county, besides acting as clerk of the peace of that county, shall also . . . . be the clerk of the county council. . . . .

(2.) He shall be from time to time appointed by the standing joint committee of the county council and the quarter sessions, and may be removed by that joint committee. . . . .

(4.) The joint committee may appoint a deputy clerk to hold office during their pleasure, and to act in lieu of such clerk in case of his death, illness, or absence, or in such other cases as may be determined by the joint committee . . . ."

Sect. 118, sub-s. 1: "A person holding office at the appointed day as clerk of the peace of a county, besides continuing to be such clerk of the peace shall, ... become the clerk of the county council, and, if appointed before the passing of this Act shall, notwithstanding anything in this Act, hold his offices by the same tenure and have the same power of appointing and acting by a deputy as heretofore in his capacity of clerk of the peace."

(2) (1878) 3 App. Cas. 944, 967.

1924

THORNELY v. LORD LECONFIELD.

which would repeal that particular law or particular custom, if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words ; the two may stand together."

[SWIFT J. referred to *Blackpool Corporation* v. *Starr Estate Co.* (1)]

The principle there laid down is in point here, and its application is reinforced when it is borne in mind that under the Municipal Corporations Act, 1882, it is expressly provided by s. 164, sub-s. 2, that the Clerk of the Peace of a borough is to hold office during good behaviour. It would certainly be an anomaly if the Clerk of the Peace of a county is to hold office at the pleasure of the Standing Joint Committee while the corresponding officer in a borough is given tenure for life. Further, as before the Act of 1888 the Clerk of the Peace could only be removed by quarter sessions upon a charge in writing made and proved, and the Standing Joint Committee is precluded from exercising judicial functions, the inference clearly is that, in the absence of express provision to the contrary, Parliament intended that the same procedure as to removal is to be followed as before the Act.

[SWIFT J. Is not s. 118 a difficulty in your way ? What was the need for that section if your contention is right ?]

That section was needed to leave existing Clerks of the Peace in the hands of quarter sessions, without the intervention of the Standing Joint Committee.

Macmorran K.C. and *John Flowers* for the defendants. While it is clear that before the coming into operation of the Local Government Act, 1888, a Clerk of the Peace held a freehold office, the position was changed by that Act, a careful distinction, however, being drawn between existing Clerks of the Peace and those subsequently appointed. The statute 1 Wm. & M. c. 21 dealt with the removal of a Clerk of the Peace for misdemeanour in his office, but the Clerks of the Peace Removal Act, 1864 (27 & 28 Vict. c. 65), after reciting the former statute, made provision for exhibiting a complaint

(1) [1922] 1 A. C. 27, 34.

against him to quarter sessions in respect of misconduct otherwise than in the execution of his office, and upon that complaint being proved, quarter sessions could remove him. The Act of 1864 was repealed by the Statute Law Revision (No. 2) Act, 1893, "except as to any Clerk of the Peace appointed before the passing of the Local Government Act, 1888": see Sch. I.; the inference from that repeal being that in the case of appointments after 1888 there was no need for the Act of 1864, inasmuch as the Standing Joint Committee was empowered to remove. Sect. 83, which so enacts, is to be construed according to its plain meaning, and sub-s. 2 says in terms that the Clerk of the Peace shall be appointed, and may be removed, by the Standing Joint Committee. It is quite natural to find the power of appointment and removal vested in the Standing Joint Committee, representing as it does the two bodies, quarter sessions and county council. With regard to the suggestion that there was no power to introduce into the resolution appointing the plaintiff a term that his office could be terminated by the giving of six months' notice, it is to be observed that s. 30, sub-s. 3, of the Act of 1888 provides that any matter arising under the Act with respect to (inter alia) the Clerk of the Peace, or with respect to anything incidental thereto, shall be determined by the Standing Joint Committee, and it is certainly incidental to the power of appointing to an office to state the terms upon which the appointment is made.

[They also referred to s. 126 of the Act of 1888.]

Lilley in reply referred to the Local Government and Other Officers' Superannuation Act, 1922.

Cur. adv. vult.

Oct. 17. SWIFT J. [after stating the facts already set out, continued:] There was no dispute between the parties as to the facts, and the whole of the issue between them is whether as a matter of law a Standing Joint Committee of a county may remove a Clerk of the Peace and Clerk of the County Council from his offices so long as he shall properly demean himself.

1924

THORNELY v. LORD LECONFIELD.

Swift J.

By the statute 1 Wm. & M. c. 21 it is provided that the clerk shall be appointed by the Custos Rotulorum and that he shall hold his office for so long time only as he shall well demean himself in his said office, and that he shall be removable from that office only on complaint made to quarter sessions and proof given that he has misdemeaned himself in his office. It was contended on behalf of the plaintiff that the tenure of the office of Clerk of the Peace was a tenure during good behaviour, and that there was no power on behalf of anybody to remove him except for misdemeanour, which had to be proved in a particular way, and it was contended that the term of the appointment that it should be terminable by six months' notice on either side was bad in law and was void.

There is clear authority that up to the coming into operation of the Local Government Act, 1888, the office of Clerk of the Peace of a county was an office for life—subject to his good behaviour—which could not be determined, and that an attempt to limit the tenure of that office by attaching conditions to the appointment must fail, either because with such conditions attached the appointment was not an appointment at all, or because such conditions were void and of no effect: see hereon *Harcourt* v. *Fox* (1) and *Rex et Reg.* v. *Owen*. (2) It was not disputed by Mr. Macmorran for the defendants in this case that, up to the passing of that Act, that was the position, but it was contended by him that the Act of 1888 expressly changed the whole position as regards the appointment, the duties, and the removal from office of the Clerk of the Peace, and that there was nothing in the law of this country as it at present stands to prevent the appointment to that office being made upon the terms that it might be determined by either the appointors or the appointee giving six months' notice to determine the holding of the office.

In order to determine this question one must consider the effect of the Local Government Act, 1888 (which established the county councils in this country for the purpose of carrying

(1) 1 Show. 506. (2) 4 Mod. 293.

out the administrative business of the county, which up to that time had been discharged by justices in quarter sessions assembled), on the office of the Clerk of the Peace. When that Act received the Royal Assent the Clerk of the Peace was the holder of a freehold office to which he had been appointed by the Custos Rotulorum, and from it whilst he lived he could only be removed in the particular manner and for the specific reasons laid down in the statutes 1 Wm. & M. c. 21 and 27 & 28 Vict. c. 65.

The first of these statutes provided machinery for his removal for impropriety in his office, and under it it was considered that he could not be removed for impropriety committed outside the duties of his office, and the statute 27 & 28 Vict. c. 65 provided procedure for removing a Clerk of the Peace from his office if he were guilty of impropriety outside that office.

In his office of Clerk of the Peace he performed as an officer of quarter sessions all those duties which had to be performed by the officer of the justices in quarter sessions assembled, both in connection with their judicial and in connection with their administrative duties.

In 1888 the Legislature set up county councils and handed over to them the administrative duties of the county, which had formerly been discharged by the justices in quarter sessions, reserving to the latter body entirely their judicial functions.

Instead of making for the new county councils a new official, the Clerk of the County Council, it provided that the Clerk of the Peace should during the term of his office hold the position of Clerk of the County Council (s. 83, sub-s. 1). For the purpose of dealing with those matters which might still belong partly to the jurisdiction of the justices in quarter sessions and under the Act belong partly to the representatives of the people in county councils, it established a joint committee of the justices and the county council, to be known as the Standing Joint Committee of the county (s. 30), to which body certain duties were relegated, amongst others being that of the appointing and removing of the Clerk of the Peace and Clerk of the County Council (s. 83, sub-s. 2).

1924

THORNELY v. LORD LECONFIELD.

Swift J.

The Act further provided that upon its coming into operation the then Clerks of the Peace should continue in office as Clerks of the Peace and Clerks of the County Councils, and for the protection of those Clerks of the Peace who held office at the date when the Act came into force it provided that, "if appointed before the passing of this Act" they "shall notwithstanding anything in this Act hold [their] office by the same tenure . . . . as heretofore": see s. 118.

It is said by the defendants that the effect of this Act was to create a new officer appointed in a different way and liable to be removed from his office by a different body and in a different manner from that which appertained to the old office of Clerk of the Peace. It is said by the plaintiff that, although a different appointing authority was created and a different removing authority was created, the conditions of the office remained the same, and that the Clerk of the Peace cannot be removed except upon the same grounds and by the same procedure as he could be removed before the Act came into force.

Whatever may be one's individual views as to a person in the position of a Clerk of the Peace holding his office by a tenure such as he held it by before the Local Government Act, 1888, and however reluctant one may be to have a person who discharges quasi-judicial functions liable to removal from his office by notice or at caprice, the question which has to be determined is not what one would like the position to be, but what it is in fact under the Local Government Act, 1888.

I have no doubt that the effect of that statute has been to repeal, so far as Clerks of the Peace are concerned, the sections in 1 Wm. & M. c. 21 which provided for their appointment and their removal.

In express terms the appointment of these officers and the removal of these officers from their offices is given to the Standing Joint Committee of the county, and to my mind s. 118, which prevents the removal of existing Clerks of the Peace by providing that they shall hold their offices on the same tenure as heretofore, shows clearly that it was not the intention of the Legislature that those who were appointed to

their offices after the Act came into operation should have the same rights.

My view is further strengthened by the fact that the statute 56 & 57 Vict. c. 54 repealed the statute 27 & 28 Vict. c. 65, which provided for the removal of Clerks of the Peace who had misdemeaned themselves outside their office, and I cannot think the Legislature intended to reserve the rights and procedure relative to Clerks of the Peace who misdemeaned themselves in their office whilst it took those rights away from, and altered that procedure in relation to, those who committed the same improprieties outside their office.

I think the contention of the defendants is correct and that it is impossible to take the view that since the Act of 1888 the procedure for the removal of the Clerk of the Peace has not been completely altered, and, if the manner of his appointment and the procedure for his removal and the person by whom he can be removed have all been altered, I see no ground for holding that the conditions upon which he held his office remain the same. I think the Act of 1888, in providing that he might be removed by the Standing Joint Committee, does not enact, and does not intend to enact, that he should not be removed except for misbehaviour, and I see nothing in the condition that the appointment may be terminated by six months' notice which is inconsistent with the power given to the Standing Joint Committee to appoint and to remove. If it were, and if a Clerk of the Peace were to hold his office for life during good behaviour, notwithstanding any term which might be inserted in his appointment, I should have to consider whether or no an appointment which purported to introduce such a limitation was not in itself bad in law, and the case of *Rex et Reg.* v. *Owen* (1) might present considerable difficulty to the plaintiff succeeding, but I do not need to determine this.

In my view, having regard to the provisions of ss. 83 and 118 of the Local Government Act, 1888, a Clerk of the Peace and Clerk of the County Council does not enjoy an office which is to be held for life during his good behaviour, and there is

(1) 4 Mod. 293.

1924

THORNELY v. LORD LECONFIELD.

nothing to prevent his appointment being made upon terms which provide for the termination of his tenure of that office. I therefore give judgment for the defendants with costs.

Judgment for defendants.

J. S. H.

The plaintiff appealed.

J. B. Matthews K.C. and *Lilley* for the appellant. Down to the time of the passing of the Local Government Act, 1888, the Clerk of the Peace, by virtue of the statute 1 Wm. & M. c. 21 held a freehold office for the term of his life subject to good behaviour in his office, and by a later Act (27 & 28 Vict. c. 65), subject to good behaviour otherwise than in his office. The appointment to that office was vested in the Custos Rotulorum, and the body in whom was vested the power of dismissing him for misconduct, whether in his office or outside it, was the justices in quarter sessions. Down to 1888 he was empowered to appoint his own Deputy Clerk. By the Act of 1888, by which the administrative duties theretofore discharged by the justices in quarter sessions were taken away from them and transferred to the new county councils, the position of Clerk of the Peace appointed after the passing of the Act was altered in several respects; by s. 83 he was to be appointed by the Standing Joint Committee of the quarter sessions and county council; he was to be removable by that joint committee, the grounds on which he was to be removable not being specified; he was, besides acting as Clerk of the Peace, to be also Clerk of the County Council, and consequently was to be the clerk of two bodies instead of one; and his right to appoint his deputy was taken away and transferred to the Joint Committee, who were empowered to appoint a Deputy Clerk to hold office during their pleasure. The question is whether those alterations in the position of new holders of the office of Clerk of the Peace, coupled with the fact that by s. 118 Clerks of the Peace appointed before the passing of the Act were to hold their offices by the same tenure and have the same power of appointing a deputy as theretofore,

indicated an intention on the part of the Legislature to create a new office to be held on a different tenure, that is to say, as no terms of the tenure were mentioned, at the pleasure of the Standing Joint Committee. The judge below held that they did indicate that intention. It is contended that that view is wrong, and that the office to which the Joint Committee are to appoint is the old office of Clerk of the Peace, which is to be held on the old terms as to its duration and the grounds of removal. The reason why it was thought necessary in s. 118 to provide that the existing Clerks of the Peace should hold "by the same tenure," was that they were to continue to be removable only by the quarter sessions, and the right of the holder of an office to be removable from it only by a particular body forms part of his tenure of it. To that extent the new clerk's tenure of his office differed from that of the old clerks, but in other respects it was the same. The clerk has very important duties to perform; he has to advise the justices at quarter sessions on all legal questions that may arise, he has to draw up from the minutes of the justices' meetings the various orders of the quarter sessions, he has to tax any bills of costs that may fall on the county rates, and do a variety of other acts which the policy of the law demands shall be done by a person of independence who feels secure in his office, and can discharge its duties without regard to the favour of his superiors. It is not to be supposed that the Legislature meant to reduce the holder of such an office to the condition of being dismissible at a few months' notice without any sufficient reasons for his dismissal, unless they have used language which is inconsistent with any other conclusion. The fact that the Joint Committee are authorized by s. 83 to appoint a Deputy Clerk to hold office during their pleasure certainly suggests that they have no such power in the case of the Clerk of the Peace himself, but that is practically what they claim to do here. The judge below thought his view was strengthened by the fact that the Clerk of the Peace Removal Act, 1864 (27 & 28 Vict. c. 65), which provided for the removal of Clerks of the Peace who had misdemeaned themselves outside their office, was repealed by the Statute

C. A. 1924

THORNELY v. LORD LECONFIELD.

Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54), except as to Clerks of the Peace appointed before the passing of the Local Government Act, 1888, for he thought it improbable that the Legislature intended to reserve the rights and procedure relative to Clerks of the Peace who had misdemeaned themselves in their office and take them away in the case of those who misdemeaned themselves outside their office. But the answer is that though the Act of 1864 is in terms repealed, it is nevertheless kept alive by the saving clauses of the Act of 1893. As was said by Lord Finlay in *Leeds Industrial Co-operative Society* v. *Slack* (1), with respect to the repeal of Lord Cairns' Act by the Statute Law Revision Act, 1883: "It is a truism that a Statute Law Revision Repeal was never intended to alter the law, but merely to remove from the statute book enactments which were obsolete or unnecessary. The repeal of 1883 must have proceeded on the view that Lord Cairns' Act was no longer necessary, and that its place had been taken by some equivalent provision," and the House of Lords there held that notwithstanding its repeal Lord Cairns' Act was preserved by the combined effect of the Judicature Act, 1873, and the saving clauses in the Statute Law Revision Acts. In view of Swift J.'s decision that a Clerk of the Peace does not now hold his office for life during good behaviour it became unnecessary for him to decide whether, if the clerk's office was in fact a freehold, the introduction of such a limitation as was attached to the appointment here would not make the appointment itself void. But he said that if it had been necessary he would have felt compelled by the authority of *Rex et Reg.* v. *Owen* (1), if that case is good law, to hold that it was void. There the Clerk of the Peace had been appointed to hold during the pleasure of the Custos, and on his being deprived the Court refused a mandamus to restore him on the ground that the appointment was void, by reason of the attachment of an invalid condition, so that he could not show any title to the office. But that case is distinguishable, for there the appointment was not severable from the condition, and the appointment was consequently void ab initio, whereas

(1) [1924] A. C. 851, 862.

here they are severable, for at all events for six months the appointee would be an independent officer, not holding at the pleasure of the Joint Committee. But if the cases are not distinguishable on that ground it is contended that *Rex et Reg.* v. *Owen* (1) was wrongly decided. The fact that the appellant accepted the office with notice of the condition can make no difference, for the Joint Committee cannot hold him to his bargain, as they themselves had no power to make such a contract. "A statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act": per Lord Selborne, *Ashbury Railway Carriage Co.* v. *Riche.* (2) It has no power to contract except so far as the statute incorporating it expressly or by necessary implication provides. That rule is not limited to companies incorporated under the Joint Stock Companies Acts, but extends to municipal corporations: *Liverpool Corporation* v. *Wright.* (3)

Macmorran K.C. and *Flowers* for the respondents. It is not disputed that down to the passing of the Local Government Act, 1888, the office of Clerk of the Peace was a freehold, and by s. 118 of that Act it continued to be so in the case of existing clerks. But s. 83 in the case of new Clerks of the Peace created a wholly new office. It took away the power of the Custos to appoint him, the power of the quarter sessions to remove him, and the power of the clerk to appoint his deputy. The new clerks had no protection under the old statutes, for there is nothing in the Act of 1888 which transfers to the Joint Committee the powers of the Acts of 1 Wm. & M. c. 21 and 27 & 28 Vict. c. 65; it gives a general power to remove the new clerks without specifying the grounds, meaning thereby that they were to be removable on any grounds that to the committee seemed sufficient. This view is supported by s. 118, which says that existing clerks shall hold their office "by the same tenure . . . . as heretofore." Those words, "the same tenure," mean all the terms and conditions on which

(1) 4 Mod. 293.

(2) (1875) L. R. 7 H. L. 653, 693.

(3) (1859) John. 359.

C. A. 1924

THORNELY v. LORD LECONFIELD.

the office was previously held, including the right to hold it for life during good behaviour, and the necessary inference from that is that the new clerks were not to hold by the same tenure, that is to say were not to hold for life, but at pleasure.

BANKES L.J. In this action the plaintiff claimed a declaration that a notice which had been given him by the Standing Joint Committee of West Sussex, terminating his employment as Clerk of the Peace, was an invalid notice, and that his office as Clerk of the Peace was a freehold office terminable only in accordance with the statutory provisions in that behalf. The action was tried upon admitted facts, which were as follows: In October, 1913, there was a vacancy in the office of Clerk of the Peace for the division of West Sussex, and the vacancy was advertised. The plaintiff applied for the appointment, and on November 14 the Standing Joint Committee passed a resolution appointing him, but on a condition that his appointment should be subject to six months' notice given by either party to determine the same. Before the meeting at which that resolution was passed a copy of the terms on which it was proposed that the appointment should be made was sent to the plaintiff. Whether the plaintiff had or had not any moral justification for departing from the condition attached to his appointment the Court has no knowledge, and expresses no opinion upon the question. The only point which the Court is asked to decide is a pure question of law—namely, whether the Local Government Act, 1888, has changed the office of Clerk of the Peace from a freehold office terminable only in accordance with certain statutory provisions into an office held at the pleasure of the Standing Joint Committee—and in my opinion Mr. Macmorran was quite right in saying that that question depends entirely upon the construction to be placed on a single sentence in one section of that Act.

But before discussing the construction to be put upon that section it is necessary to bear in mind the condition of things with reference to the office of Clerk of the Peace at the time the Act was passed, and for that purpose it is necessary to

refer briefly to three statutes. It is not disputed that up to the time of the passing of the Act of 1888 the office of Clerk of the Peace was a freehold office, but a freehold office of a very peculiar nature, in that the power of appointment lay with one authority, that of removal with another, while latterly the fixing of his salary lay with a third—namely, the Secretary of State for Home Affairs. The first statute to which our attention was drawn was 37 Hen. 8, c. 1, and the only point to notice is that under it the appointment to the office of Clerk of the Peace rested with the Custos Rotulorum, the Lord-Lieutenant of the county, and, when made, lasted as long as the Custos Rotulorum held his own office and the clerk demeaned himself justly and honestly. The next statute is 1 Wm. & M. c. 21 which, while leaving the appointment with the Custos Rotulorum, altered the duration of the office, making it last for the life of the clerk without regard to the tenure by the Custos Rotulorum of his own office, though subject to the clerk's liability to removal for misdemeanour. And with regard to that it was provided that if he misdemeaned himself in his office upon a complaint made to the justices in quarter sessions they should have power to suspend or remove him. Then the Clerk of the Peace Removal Act, 1864, made a further change in the tenure of the office, because it gave jurisdiction to the quarter sessions, upon a complaint made by two justices that the clerk had been guilty of misconduct otherwise than in his office, to deal with him in the same way as if the misconduct had been in the exercise of his office.

That was the position with respect to the Clerk of the Peace at the time of the passing of the Act of 1888, and it is material to bear in mind that up to that time the general business of the county, judicial and administrative, had been transacted by the quarter sessions, and the Clerk of the Peace had been their chief officer to assist them in the conduct of both classes of business. The principal object of that Act was to sever the administrative business from the judicial and transfer the former to a new body, the county council, and thereupon it became necessary to make provision for an officer to assist

C. A. 1924

THORNELY v. LORD LECONFIELD.

Bankes L.J.

that new body in the discharge of its duties. But in addition to the judicial business of the county, which was left to the quarter sessions, and the general administrative business, which was transferred to the county council, there was a certain class of business which it was thought desirable should be dealt with by both bodies jointly, and it was provided by s. 30 that for the purpose of the police and of certain other matters, including the Clerk of the Peace, there should be a Standing Joint Committee of the quarter sessions and the county council. Then s. 83 provides that Clerks of the Peace appointed after the passing of the Act shall be appointed by the Standing Joint Committee and may be removed by that committee, and when so appointed shall, besides acting as Clerk of the Peace, also be Clerk of the County Council. And similarly s. 118 provides, with respect to a Clerk of the Peace appointed before the passing of the Act, that he also shall, besides continuing to be such Clerk of the Peace, become the Clerk of the County Council, though he shall hold his offices by the same tenure as before. In my opinion s. 83, when dealing with the duties, appointment and removal of Clerks of the Peace appointed after the passing of the Act, is dealing, not with a new office created by the Act, but with the old office of Clerk of the Peace, the well-known office of that name. It uses the definite article : "The Clerk of the Peace . . . . shall also be Clerk of the County Council." It, indeed, goes on to say that he shall be appointed by the Standing Joint Committee instead of by the Custos Rotulorum as before, and that he shall be removable by the same committee instead of by the quarter sessions, but the terms on which he is to be appointed and the grounds upon which he is to be removable are the terms and grounds incident to the old office. That this is so is emphasized by the language of sub-s. 4 of s. 83, to which Sargant L.J. drew attention in the course of argument. That sub-section says that "the Joint Committee may appoint a deputy clerk to hold office during their pleasure," whereas the section is silent as to the terms on which the clerk shall hold his office. For these reasons I am unable to agree with the view taken by Swift J. The

essential distinction between his view and mine is that he looks upon the office of a Clerk of the Peace appointed since 1888 as a new office, whereas I look upon it, as I have said, as the old office with new duties, which new duties do not alter a tenure which has always been held to be that of a freehold. I think that the appeal must be allowed, and that the plaintiff is entitled to the declaration sought.

ATKIN L.J. The office of Clerk of the Peace is one of the oldest offices known to our law. It dates back to a period shortly after the institution of justices of the peace in the reign of Edward III., and from the outset the Clerk of the Peace seems to have been appointed by the Custos Rotulorum. What his precise tenure was before 1545 is not certain, though there is ground for supposing that it was an office for life; but in that year a statute was passed (37 Hen. 8, c. 1), by which the position was regularized, and it was thereby provided that the appointment of the Clerk of the Peace should be with the Custos Rotulorum, and that the clerk should hold his office during the time that the Custos Rotulorum exercised his own office, subject to the clerk demeaning himself honestly and justly in his office. That continued to be the position down to 1688, when the Act of 1 Wm. & M. c. 21 was passed. By that Act the appointment of the Clerk of the Peace was left with the Custos Rotulorum as before, but the office was made tenable for the life of the clerk so long as he demeaned himself well in his office. Provision was made for his removal by the quarter sessions in the event of proof in open session that he had misdemeaned himself in his office. It is unnecessary to dwell on the public importance of that tenure. The Clerk of the Peace had to perform two classes of duties; he was the legal adviser of the justices in quarter sessions; he was the Clerk of the Court of Record and responsible for the drawing up of the necessary orders, indeed he was frequently the only lawyer officially connected with the Court. It is remarkable that that should have been allowed to be so, considering the important jurisdiction given to the quarter sessions, and the very difficult questions of

C. A. 1924

THORNELY v. LORD LECONFIELD.

Atkin L.J.

law that constantly arise before them. But the more remarkable it is, the more important becomes the position of the Clerk of the Peace. Further, he would have, as taxing officer of the Court, to tax the costs of proceedings before the Court, the incidence of which costs would in many cases be directly on the county rate, and he would also have to assist in auditing local government accounts. All those duties are duties of the first importance, which obviously require judicial qualities, and it is of the greatest importance that the person discharging them should be a man of independence and that he should be able to feel that he is secure in his office. In addition to the duties that I have mentioned the Clerk of the Peace was also clerk to the justices in their administrative capacity, and it is matter of common knowledge that down to the passing of the Local Government Act the justices were the persons who conducted the administrative business of the county, relating to highways, bridges, police and other matters, and in connection with which they had very important duties to perform.

That being the position of the Clerk of the Peace, and he having been for exactly 200 years an officer who held office for life and could only be removed on proof of misbehaviour, there was passed the Local Government Act, 1888. That Act took away from the quarter sessions the power and duty of conducting the administrative business of the county, but without in any way interfering with their judicial business. Having constituted the county council and specified the matters with which it was to deal, it proceeded to provide for the officers of the county council, which it did by s. 83. [His Lordship read the section.] It is said that the effect of that section is to destroy the independence that the Clerk of the Peace had enjoyed for 200 years, and rendered him subject to the control of the Standing Joint Committee by empowering that body to attach a condition to his appointment that he should be dismissible upon such notice as they could induce him to agree to. That would be a very remarkable step for the Legislature to take. Of course they might take it, but it would require very clear words to show that they had in fact

done so, and I do not think that the language of the section is sufficient for the purpose. The inference which I draw from that language is that the Legislature, while altering the authority entrusted with the appointment and removal of the Clerk of the Peace, did not intend to affect the conditions on which the office should be held. I think it is clear that, instead of creating a new office, with entirely new incidents, they intended to preserve the old office. The words are, "The clerk of the peace of a county, besides acting as clerk of the peace of that county, shall also be the clerk of the county council." It may have been reasonable enough to alter the appointing authority, but that alteration does not necessarily affect the position of the office holder when once the appointment has been made. And the same may be said with respect to the alteration of the removing authority. In one other respect there was a slight alteration in the powers of future Clerks of the Peace. Before the Act they had power themselves to appoint their own deputies, and after the Act the power of appointing Deputy Clerks was given to the Joint Committee. But, except for that, to my mind the effect of the section was to transfer to the Standing Joint Committee the power of the Custos Rotulorum to appoint a Clerk of the Peace and the power of the justices in open session to remove him, and nothing more.

It is said however that the construction of the section for which the defendants contend is supported by two other considerations. First it is said that the saving clause, in the first paragraph of the section, with respect to the protection of Clerks of the Peace holding office at the passing of the Act, shows that the defendants' contention is right. That refers to s. 118, which provides that a Clerk of the Peace "if appointed before the passing of this Act shall, notwithstanding anything in this Act, hold his offices by the same tenure . . . . as heretofore in his capacity of Clerk of the Peace." It was said that that provision suggested that new Clerks of the Peace were not to hold their offices by the same tenure. It must be conceded that there is force in that argument. But what is meant by the words "by the same tenure"? Both counsel

C. A. 1924

THORNELY v. LORD LECONFIELD.

Atkin L.J.

are agreed that they mean "on the same terms and conditions." But included in those conditions would be the right to be removed by the same body—namely, the justices in open session—and inasmuch as the new Clerks of the Peace were clearly being deprived of that right, if it was intended to preserve that right to the old Clerks of the Peace it was necessary to provide that they should continue to hold by the same tenure. If any one asked by what tenure the judges of the High Court held their office the answer would be that they held it during good behaviour and subject to removal only upon a resolution by both Houses of Parliament. The other point made was this. It was said that under the Act of William and Mary the Clerk of the Peace could only be removed for misdemeanour in his office by the justices in open session, and the same was true under the Act of 1864 in the case of removal for misdemeanour outside the office; and it was said that inasmuch as that was the only means of removing him, and the Joint Committee do not sit in open session, the power of removing for misdemeanour of either kind in the case of the new clerks would be gone. The answer, I think, is this: Where a person holds an office terminable only in the event of his misbehaviour it is not an essential condition of his removal that the fact of the misbehaviour should be established by a judicial body. The person entrusted with the power of removal must of course act judicially, but that is enough. For instance a parish sexton, at common law, holds his office for life subject to good behaviour, but he may be removed by the parson for misconduct provided he acts judicially and gives him an opportunity of being heard in his defence. In the same way the Joint Committee can deal with an offending Clerk of the Peace. But the matter appears to me to be made quite plain by s. 78, which provides by sub-s. 1 that "All enactments in any Act . . . . relating to any . . . . powers . . . . transferred by or in pursuance of this Act from any authority . . . . to any joint committee shall . . . . be construed as if (*a*) any reference therein to the said authority . . . . referred to the county council or to a committee thereof." And by sub-s. 3: "Where under any such

enactment as in this section mentioned any powers . . . . are to be exercised . . . . after any presentment or in any particular manner . . . . the county council may, by the standing orders for the regulation of their proceedings, provide for the exercise . . . . of those powers . . . . without any such prior presentment or in a different manner." That seems to me to dispose of the suggested difficulty. The result of all that I have said is that to my mind the Standing Joint Committee have no power to alter the ancient position of the Clerk of the Peace and to remove him from the position of an independent officer to that of their dependent servant, and consequently have no power to make it a condition of his appointment that it should be terminable at six months' notice.

There is a further matter which, though not argued on behalf of the respondents, I think the Court ought to consider—namely, whether the appointment, having been made subject to an invalid condition, was void, so that the appointee never became Clerk of the Peace at all. That is an important matter, for doubts might be thrown on the validity of acts done by the clerk in his official capacity. That position was in fact considered in *Harcourt* v. *Fox* (1), though it was not necessary to the decision of that case, where the only question raised was whether a Clerk of the Peace appointed after 1 Wm. & M. ceased to hold his office upon the removal of the Custos who appointed him, but the judges used language which directly covers the present point. Holt C.J. said (2) that as the power of the Custos was to appoint the clerk "for so long time only as such Clerk of the Peace shall well demean himself in his said office" he could not grant an estate in the office for anything less than life, or attach any other limitation to the grant. "He is so confined up by this Act, that he shall not make him *during pleasure* or *for years*, but when he has nominated him that is all he has to do, and then he is in by the Act that gives him estate." And after referring by way of analogy to the case of a man assigning a rent for dower out of the lands dowable, which must be for no less estate than life, because

(1) (1693) 1 Show. 506. (2) Ibid. 535.

C. A. 1924

THORNELY v. LORD LECONFIELD.

Atkin L.J.

"the estate is by custom and cannot be granted for a lesser estate than what the custom appoints," he went on, "So here all that the Custos has to do in reference to this office of Clerk of the Peace, is to point out the person that should have it; and as the other is in by custom, so here he is in by Act of Parliament; the Custos when he has named him has executed his authority, and cannot qualify the interest which passes by the Act." And Gregory J. in the same case (1) said: "When once the Custos has named him, he has no further power by this Act over him . . . . for being once in his office, the law settles him there." So here the Joint Committee having named the clerk cannot qualify his interest. The condition which they attached to the appointment is in my opinion severable from it and may be disregarded as of no effect. For these reasons I agree that the appeal must succeed.

SARGANT L.J. I am of the same opinion. It is conceded that before 1888 a Clerk of the Peace could not have been appointed subject to any such condition as the Joint Committee here sought to impose. The question therefore is: What is the extent of the alteration that has been made by the Act of 1888? The two contending views have been put with great clearness by the learned judge thus:—"It is said by the defendants that the effect of this Act was to create a new officer appointed in a different way and liable to be removed from his office by a different body and in a different manner from that which appertained to the old office of Clerk of the Peace. It is said by the plaintiff that, although a different appointing authority was created and a different removing authority was created, the conditions of the office remained the same, and that the Clerk of the Peace cannot be removed except upon the same grounds and by the same procedure as he could be removed before the Act came into force." The question is: On the true interpretation of the Act, which is the correct view of its effect?

It seems to me that the language of the Act, and particularly of s. 83, is language which provides for the continuation

(1) 1 Show. 523.

of the old office with certain extra duties added to it, and not for the creation of a new one. The result of that is to negative any alteration except such as is effected by the express words of the Act or by necessary implication. It is true that both the appointing body and the removing body have been altered, but it does not seem to me to be thereby necessarily implied that the grounds on which the clerk may be removed have been altered. I think it would require some express words or some necessary implication to show that the new removing body could act on different grounds from those on which the old removing body could have acted. It is noticeable that s. 83 merely says that the clerk may be removed by the Joint Committee, and it does not contain any words stating that he is to hold office at their pleasure. The omission seems to me a very striking one, and I think it can hardly have been intended that so fundamental an alteration in the position of the holder of the office should have been introduced without words to that effect. That view to my mind is strengthened by the provision in sub-s. 4 of s. 83, that "the joint committee may appoint a deputy clerk to hold office during their pleasure." The express insertion of those words in that sub-section seems to me to indicate that it was not by inadvertence that similar words were not introduced into sub-s. 2, which deals with the appointment and removal of the Clerk of the Peace.

In s. 118, however, there is a real difficulty. That is the section which preserves the rights of a Clerk of the Peace holding office at the time of the passing of the Act, and it provides that he shall continue to hold his office "by the same tenure . . . . as heretofore." Now I recognize that it would be the more usual interpretation of those words "by the same tenure" to treat them as referring rather to the duration of the office or to the conditions on which it might be terminated than to the procedure by which the holder might be removed, and I was impressed by the argument for the respondents to that effect. But the words cannot be regarded as altogether inappropriate if read as referring to the procedure of removal; and, coming as they do in a saving clause for the protection

C. A. 1924

THORNELY v. LORD LECONFIELD.

Sargant L.J.

of existing holders of the office, it would be wrong to attribute to them as much importance in defining the position of future holders of the office as is to be attached to the reasonably plain words of s. 83, which is directly concerned with the position of future holders. Accordingly I think that it would be pressing that phrase "by the same tenure" too far if it were held to have the effect of making the extraordinary difference in the position of holders of the office that is contended for by the respondents.

Appeal allowed.

Solicitors for the appellant: *Blundell, Baker & Co.*

Solicitors for the respondents: *Kenneth Brown, Baker & Baker, for Wannop & Falconer, Chichester.*

J. F. C.

C. A. 1924 *Nov.* 20.

[IN THE COURT OF APPEAL.]

BALDRY *v.* MARSHALL.

Sale of Goods—Implied Condition as to Fitness for particular Purpose—Express Exclusion of Warranty — Effect of — Sale of specified Article under trade Name—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14.

By s. 14, sub-s. 1, of the Sale of Goods Act, 1893: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose;

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

The plaintiff, being desirous of buying a motor car, applied to the defendants, motor car dealers, and told them that he wanted a comfortable car which was suitable for touring purposes. The defendants said they thought that a "Bugatti car," a type of car in which they specialized, would meet those requirements, and showed him a specimen. The plaintiff then gave the defendants an order for "an eight cylinder Bugatti car" on the terms that the defendants should guarantee the car for twelve months against defects of manufacture, it being stipulated by the defendants that that guarantee "expressly excludes any other

guarantee or warranty, statutory or otherwise." An eight cylinder Bugatti car was delivered to the plaintiff in pursuance of the order, but proved to be uncomfortable and unsuited for touring purposes. The plaintiff claimed to reject the car, and sued to recover back the purchase money which he had paid:—

Held, (1.) That the requirement that the car should be comfortable and suitable for touring purposes was a condition and not a warranty, and that on the principle of *Wallis* v. *Pratt* [1911] A. C. 394 the implication of that condition was not excluded by the terms of the contract;

(2.) That the mere fact that an article is sold under its trade name, in the sense that the trade name forms part of the description of the thing sold, does not necessarily bring the case within the proviso to s. 14, sub-s. 1, so as to exclude the implication of the condition of fitness. If the buyer, while asking to be supplied with an article of a named make, indicates to the seller that he relies on his skill and judgment for its being fit for a particular named purpose, he does not buy it "under its trade name" within the meaning of the proviso; and the Court, being satisfied upon the facts that the plaintiff relied on the defendants' skill and judgment, held that the proviso did not apply.

Decision of Greer J. affirmed.

APPEAL from Greer J.

The plaintiff, who was dissatisfied with a motor car which he then possessed, on the ground that it was uncomfortable and an unsuitable one in which to take out his wife, wrote on April 13, 1923, to the defendants, motor car dealers, "Can you tell me if the Bugatti eight cylinder is likely to be on the market this year and if so will you send particulars." The defendants, in reply, sent full particulars and a specification, and added, "As no doubt you are already aware, we specialize in the sale of these cars, and are in a position to supply you with all information necessary." The plaintiff knew nothing about Bugatti cars, except what he had read in newspapers. At an interview with the defendants he informed them that he wanted a fast car, which would be flexible and easily managed, and that would be comfortable and suitable for the ordinary purposes of a touring car. The defendants said that they thought a Bugatti car would satisfy those requirements, and showed him a specimen. He then gave them an order on one of the defendants' printed order forms: "Please supply me, on the terms and conditions hereinafter specified, with one eight cylinder Bugatti car, fully equipped and finished as per car inspected." Among the terms and

C. A. 1924

BALDRY v. MARSHALL.

conditions were the following: "The company reserve the right to withdraw any model or alter specifications and prices without notice. Illustrations and specifications must be taken as a general guide and not as binding in detail," and "Guarantee the same as received by us from the manufacturers." The guarantee given by the manufacturers was for twelve months against breakage of parts due to faulty material, there being a stipulation that the said guarantee, if accepted, "expressly excludes any other guarantee or warranty, statutory or otherwise." An eight cylinder Bugatti car was eventually delivered by the defendants to the plaintiff in pursuance of that order, but it was found that the car was not a comfortable one or suitable for touring purposes. The plaintiff claimed to reject the car, and brought the action to recover back the purchase money which he had paid. Greer J. held that an implied condition arose under s. 14, sub-s. 1, of the Sale of Goods Act, that the car should be reasonably fit for touring purposes, and that on the principle of *Wallis* v. *Pratt* (1) that condition was not excluded by the terms of the contract, which was expressed only to exclude warranties and not conditions. He accordingly gave judgment for the plaintiff.

The defendants appealed.

Jowitt K.C. and *Astell Burt* for the appellants. The implication of an undertaking that the car should be suitable for touring purposes was excluded by the guarantee clause. *Wallis* v. *Pratt* (1) has no application, and for two reasons: in the first place what is called a condition in s. 14 is, as applied to the facts of the present case, really a warranty. Though the distinction between warranties and conditions is well established, it is frequently a matter of great difficulty to determine whether a particular undertaking belongs to the one class or to the other. As Bailhache J. said in *Harrison* v. *Knowles* (2): "The rule to apply is that where the subject matter of a contract of sale is a specific existing chattel a statement

(1) [1911] A. C. 394. (2) [1917] 2 K. B. 606, 610.

as to some quality possessed by or attaching to such chattel is a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract." And what Bailhache J. there says with reference to a specific existing chattel equally applies to a chattel which is to be supplied. In *Wallis* v. *Pratt* (1), which was decided under s. 13, the contract was for common English sainfoin and what was delivered was giant sainfoin, something totally different in kind. That admittedly was a breach of a condition; the purchaser did not get what he contracted for. But here the plaintiff did get what he contracted for, which was a Bugatti car. If the terms as to the car being comfortable and suitable for touring purposes had been written out in the contract, no one would have said that non-compliance with those requirements amounted to more than a breach of warranty. It must equally be so if the obligation of compliance is to be implied. That s. 14 wrongly calls it a "condition" can make no difference. Secondly, assuming that it amounted to a breach of condition, it was covered by the word "guarantee." The contract excluded "any other guarantee or warranty," and, as it must have meant something different by the use of the word "guarantee" from what it meant by the use of the word "warranty," it must have been referring to "conditions." But even if the implied condition of fitness is not excluded by the terms of the contract, it is so excluded by the proviso to the sub-section. The evidence went to show that Bugatti cars were well known in the market as being constructed on a well-known principle, and had acquired a trade name, and the plaintiff here bought the car under that trade name. In *Bristol Tramways Co.* v. *Fiat Motors* (2) the plaintiffs bought from the defendants under a contract in writing "the Fiat omnibus" which they had inspected and "six Fiat omnibus chassis." They had informed the defendants that the omnibus and chassis were required for the conveyance of passengers in a hilly district. On delivery they were found to be unfit for that purpose. It was there held that the proviso

(1) [1911] A. C. 394. (2) [1910] 2 K. B. 831.

C. A. 1924

BALDRY v. MARSHALL.

to s. 14 did not apply. But the case turned on the fact that there was no such thing known to the trade as a Fiat omnibus. Farwell L.J. (1) said: "It is one thing to order an article known as a Fiat omnibus, an order which is intelligible only if there be such an article known to the public or the trade; it is quite another to order an omnibus to be made by the Fiat company, although in the latter case that company might adopt patterns and devices which were its own exclusive property: the former is within the proviso, the latter is not." But if there had been such a thing known to the trade as a Fiat omnibus, the Court would there have held that the proviso applied, notwithstanding that the plaintiff had told the defendants the purpose for which the articles were wanted, and notwithstanding further that they relied, as the trial judge found to be the fact, upon the skill and judgment of the sellers. Farwell L.J. (1) said: "If a man orders in express terms an article known by a patent or trade name under that name and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even although he told the vendor before he ordered it the purpose for which he required it." The proviso is not limited to cases in which the buyer does not rely on the skill and judgment of the seller, but extends to cases in which, although he does so, he buys under a trade name. As is said in Benjamin on Sales (6th ed., p. 725): "In such a case the buyer's purpose is not an essential element of the sale, but is merely his motive in purchasing."

Neilson K.C. and *Wynn Werninck* for the respondent were called on only as to the effect of the proviso. There can be no "sale of a specified article under its trade name" within the meaning of the proviso except where an order is given for an article specified by the buyer under its trade name without anything more being said. In such a case there will no doubt be no implication of any condition as to fitness. But these Bugatti cars could not have been ordered under their trade name without something more, for they were not of

(1) [1910] 2 K. B. 839.

a constant specification. By the terms of the contract the makers reserve to themelves the right to alter the design. Therefore the proviso can have no application.

BANKES L.J. This is an appeal from a judgment of Greer J., and upon the facts as found by the learned judge his conclusion was in my opinion quite right. It appears that the plaintiff wrote to the defendants, "Can you tell me if the Bugatti eight cylinder is likely to be on the market this year, if so will you send particulars?" indicating that according to his impression this was a new type of car that was going to be put on the market. In their reply the defendants said: "As no doubt you are already aware, we specialize in the sale of these cars, and are in a position to supply you with all information necessary," thereby intimating that the plaintiff might regard them as persons upon whose skill and judgment he could safely rely. Those letters were followed by an interview at which the plaintiff made plain to the defendants the purpose for which he required the car. Then came the contract, which was on a printed form. It was in the form of a request by the plaintiff to the defendants to supply him with "one eight cylinder Bugatti car fully equipped and finished to standard specification as per the car inspected." On the back of the contract there was printed "The company reserves the right to withdraw any model or alter specifications or prices without notice. Illustrations and specifications must be taken as a general guide and not as binding in detail," and under the heading "Guarantee" the words, "The same as received by us from the manufacturers." The guarantee which they had so received from the manufacturers was expressed to be "against any breakage of parts due to faulty material," and contained the following clause: "Cars are sold on condition that the foregoing guarantee is accepted instead of and expressly excludes any other guarantee or warranty, statutory or otherwise." It is said that by the use of that language the defendants meant to exclude conditions as well as warranties; but they have not done so, and

C. A. 1924

BALDRY v. MARSHALL.

Bankes L.J.

if there is one thing more clearly established than another it is the distinction which the law recognizes between a condition and a warranty. In *Wallis* v. *Pratt* (1) the sellers by a clause stating that "Sellers give no warranty express or implied" endeavoured to exclude the condition implied under s. 13 of the Sale of Goods Act, that the goods sold should correspond with the description, but the House of Lords held that they had not used apt words to effect that purpose. So here the defendants have not used the necessary language to exclude the implied condition which arises under s. 14 as to fitness for the particular purpose of which the plaintiff had given them notice. But then it is said that even if the implication of that condition is not excluded by the terms of the contract it is excluded by the proviso to sub-s. 1 on the ground that the car was sold under its trade name. It is however clear to my mind upon the evidence that it was not in fact sold under a trade name within the meaning of the proviso. The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale a sale under a trade name. Whether it is so or not depends upon the circumstances. I may illustrate my meaning by reference to three different cases. First, where a buyer asks a seller for an article which will fulfil some particular purpose, and in answer to that request the seller sells him an article by a well-known trade name, there I think it is clear that the proviso does not apply. Secondly, where the buyer says to the seller, "I have been recommended such and such an article"—mentioning it by its trade name—"will it suit my particular purpose?" naming the purpose, and thereupon the seller sells it without more, there again I think the proviso has no application. But there is a third case where the buyer says to a seller, "I have been recommended so and so"—giving its trade name—"as suitable for the particular purpose for which I want it. Please sell it to me." In that case I think it is equally clear that the proviso would apply and that the implied condition of the thing's fitness for the purpose named would not arise. In my opinion

(1) [1911] A. C. 394.

the test of an article having been sold under its trade name within the meaning of the proviso is: Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be? Here there is nothing to show that the plaintiff when describing the car in the contract as an "eight cylinder Bugatti car," after he had communicated to the defendants the purpose for which he wanted it, meant to intimate that he was not relying on their skill and judgment. The evidence seems to be all the other way. In my opinion the appeal must be dismissed.

ATKIN L.J. I agree, though I am bound to say that, as in other cases, I have considerable difficulty in construing the proviso to s. 14, sub-s. 1. What is meant by "a sale of a specified article under its trade name"? What is the meaning of "a specified article?" and what is meant by "a sale under a trade name"? Where a person buys an article like a motor car of a named make upon a particular specification, after he has inspected a specimen and has informed the seller that he desires a car to satisfy certain requirements, and the design is capable of being adapted to meet those requirements, I think it would be very difficult to suggest that he bought it under its trade name. It would seem rather to be bought under the specification with a condition as to adaptation. And if so the case would not fall within the proviso. Take again the case put by my Lord of a buyer who goes to a dealer in motor vans and tells him that he wants a motor van for the purposes of his business, that it must not be too heavy, because of the nature of the roads over which it will have to travel, and that it must be sufficiently powerful to enable it to climb a particular hill, and the dealer says that under the circumstances he cannot do better than buy "an X van," and he accordingly buys an X van. In such a case is the implied condition of fitness excluded? I do not think so. The real object of the proviso was to meet a case

C. A. 1924

BALDRY v. MARSHALL.

Atkin L.J.

like that in *Chanter* v. *Hopkins* (1), where the defendant sent to the plaintiff, who was the patentee of an invention known as "Chanter's smoke consuming furnace," the following order: "Send me your patent hopper apparatus to fit up my brewing copper with your smoke consuming furnace," and upon the plaintiff supplying what was ordered it was found to be unsuitable for a brewery. There the defendant took the risk of the apparatus being suitable for his particular purpose, and having got what he ordered he was held bound to pay for it. *Prideaux* v. *Bunnett* (2) is to the same effect. There the defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," who carried on business as "The Smoke Prevention Company," an order, "Please prepare us a smoke preventing valve." The valve supplied was found to be useless for the purpose for which it was designed, but the defendant was held liable to pay the price. In the course of argument Cockburn C.J. said: "The defendant intended to purchase the very thing," and Cresswell J. said: "Taking all the evidence together, is it not clear that the order was given for the patented, the ascertained article?" It appears to me that the right view of the matter is that when the proviso speaks of "the sale of a specified article under its patent or other trade name," it means an article specified by the purchaser as being the article which he wishes to buy. If he so specifies the article and it is sold to him under its trade name it seems clear that the condition is excluded, even though he made known to the seller the purpose for which he intended to use it. But if on the other hand he buys the article in reliance on the seller's assurance that it will answer his purpose, the fact that it is described in the contract by its trade name will not have the effect of excluding the condition. And upon the evidence I think that the present case falls within the latter proposition.

It remains to consider whether the learned judge in the Court below was right in holding that the implied condition of fitness was not excluded by the terms of the contract

(1) (1838) 4 M. & W. 399. (2) (1857) 1 C. B. (N. S.) 613, 616.

itself. What the contract said was that the express guarantee should be taken as excluding "any other guarantee or warranty, statutory or otherwise." It said nothing about "conditions," and I do not think that the words "any other guarantee" can be read as meaning "any other condition," merely because they are used in addition to the word "warranty." In those circumstances the reasoning of the House of Lords in *Wallis* v. *Pratt* (1) applies to the present case. In that case their Lordships based their decision on the distinction which is drawn in the Sale of Goods Act between a condition and a warranty, and just as they held there that the implied condition under s. 13, that goods sold by description shall correspond with the description, was not excluded by a clause which excluded warranties, so here a similar clause cannot be regarded as excluding the condition of fitness which arises under s. 14. I think the learned judge was right and that this appeal should be dismissed.

SARGANT L.J. I am of the same opinion, and I will confine my observations to the meaning of the proviso to s. 14, sub-s. 1. It seems to me that the articles which are dealt with in that proviso are primarily things like patent medicines and common articles sold under well-known trade names. In my judgment the proviso does not apply to an article like a motor car, which is sold under a very elaborate and specific description. The proviso rather applies to a "sale of a specified article under its patent or other trade name," and it seems to me that the sort of mischief it was intended to prevent was this:—It is well known that patent medicines and articles sold under trade names are often sold under puffing or laudatory names, which imply that the article will perform a definite function satisfactorily. Suppose a hosier were to offer for sale some hose as "holeproof hose," and a purchaser were to send him an order for holeproof hose, I think it is clear that the purchaser would under ordinary circumstances be relying on the skill and judgment of the vendor to sell him an article

(1) [1911] A. C. 394.

C. A. 1924

BALDRY v. MARSHALL.

Sargant L.J.

which would have the quality implied in its name. But if there is on the market a well-known article known as hole-proof hose, then it seems to me that the proviso is aimed at preventing an order of that article under its laudatory name from raising the implication that the buyer is asking the seller to supply him with something which will fulfil the requirements indicated by the name. I do not say that that is the only purpose of the proviso, but I think it is the main purpose.

But apart from that I think that too much importance has been attached to the proviso in the argument for the appellant, because it seems that it is only to apply in the absence of anything to the contrary, that is to say, it is only on the mere ordering of an article by its trade name that the implied condition is excluded. In my judgment, although a person may order an article under a patent or trade name within the meaning of the proviso, yet if at the same time that the order is given he makes it clear to the vendor that he is relying on his skill and judgment to ensure that the article shall be fit for the particular purpose, the proviso has no application, and the buyer is entitled to the benefit of the provisions of sub-s. 1. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *G. A. Herbert.*
Solicitors for the respondents: *Christopher & Son.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1924
June 18, 19, 20; *July* 15.

COMMERCIAL AND ESTATES COMPANY OF EGYPT *v.* THE BOARD OF TRADE.

Indemnity Act—Requisition—Compensation—Principle of Assessment—Prerogative Right of the Crown—Regulation for Defence of Realm—Angary—Defence of Realm Regulations 2 B *and* 2 J J—"*Legal right apart from this Act*"—*Indemnity Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-s.* 1 (*b*); *sub-s.* 2 (i.) *and* (iii.) (*a*).

By s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, any person who has, otherwise than as owner of a ship, incurred direct loss by reason of interference with his property in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any regulation made or purporting to be made under any enactment relating to the defence of the realm shall be entitled to compensation in respect of his loss.

By sub-s. 2 the compensation is to be assessed in accordance with the following principles: (1.) Where under any regulation made or purporting to be made as aforesaid any special principle for assessment of any compensation is contained in the regulation, compensation shall be assessed in accordance with that principle; (iii.) in any other case (*a*) if the claimant would, apart from the Act, have had a legal right to compensation, the tribunal shall give effect to that right, but in assessing compensation shall have regard to the amount of the compensation to which, apart from the Act, the claimant would have been legally entitled, and to the existence of a state of war and to all other circumstances relevant to a just assessment of compensation.

A British ship lying in a neutral port and laden with a cargo of timber belonging to neutrals of another country was requisitioned during the war by the British Government and brought home with her cargo to this country without the consent and against the protest of the cargo owners. The timber was then requisitioned by the Controller of Timber Supplies on behalf of the Board of Trade avowedly under regs. 2 B and 2 J J of the Defence of the Realm Regulations. The owners of the cargo made a claim in the War Compensation Court for compensation and contended that it should be assessed under s. 2, sub-s. 2 (iii.) (*a*), of the Indemnity Act, 1920, on the ground that in the circumstances they would but for the Act have had a legal right to compensation:—

Held (by Bankes and Atkin L.JJ.; Scrutton L.J. dissenting), that the Regulations did not apply to a seizure of goods of a neutral brought into this country against his will; that the requisition of the timber was justifiable as an exercise of the royal prerogative right of angary and was therefore made "in exercise of" a "prerogative right of His Majesty" within the meaning of s. 2, sub-s. 1 (*b*), of the Act; that inasmuch as that right involved the obligation to pay full compensation to the owner of the property seized, the claimants "would have had apart from" the Act a valid claim for compensation by petition of

C. A.

1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

right, and (the Crown admitting that such a claim constituted "a legal right to compensation") that compensation was therefore to be assessed according to the principle laid down in s. 2, sub-s. 2 (iii.) (*a*), of the Act.

Held by Scrutton L.J. dissenting, that the claimants had suffered direct loss by reason of interference with their property through the exercise or purported exercise of a regulation made or purporting to be made under an enactment relating to the defence of the realm within s. 2, sub-s. 1 (*b*), of the Act, and were therefore entitled to compensation to be assessed according to the special principle contained in the regulation.

APPEAL from the decision of the War Compensation Court.

The Commercial and Estates Company of Egypt (hereinafter called "the claimants") were a company registered under the laws of Egypt and carrying on business in Alexandria as timber merchants and importers. They had no place of business in the United Kingdom or in any British Dominion. In 1913 they had bought a quantity of timber in Finland to be delivered at a Finland port. In March, 1914, they entered into a chartering contract with a London firm for the chartering of various vessels to carry the timber from Finland to Alexandria, and by a charterparty dated June 25, 1914, they chartered a steamer, the *Falls of Nith*, for this purpose. In July, 1914, they shipped a cargo on board the *Falls of Nith* at a port near Wiborg, retaining the bill of lading in their own hands. The steamer started on her voyage, but was prevented by the outbreak of the war from continuing it, and was obliged to put into Frederikshamn awaiting the time when she could proceed. In 1915 a supplementary contract was made between the owners of the steamer and the claimants, whereby it was agreed that the timber should remain on board till the end of the war, and that the steamer should then proceed with the timber to Alexandria. She remained at Frederikshamn under this contract until July, 1917. While still there she was on August 3, 1917, requisitioned by the Shipping Controller. Her cargo in spite of protests from the claimants was brought to England, partly in the steamer herself and partly in other British vessels, which had been also requisitioned, and as each vessel arrived the timber on board of her was

requisitioned by the Controller of Timber Supplies on behalf of the Board of Trade avowedly in pursuance of powers conferred by the Defence of the Realm Regulations and in one instance under reg. 2 B specifically. (1) The value of the timber so seized was about 60,000*l*.

On February 11, 1918, the claimants brought an action against the Timber Controller, *Commercial and Estates Company of Egypt* v. *Ball* (2), insisting that the requisition was ultra vires and void and claiming a return of the timber, an injunction against interfering with it, and a declaration that the defendant must pay the full value of it if he refused to restore it. The defendant justified his acts under regs. 2, 2 B, and 2 J J of the Defence of the Realm Regulations, and alternatively under the prerogative right of angary: see *The Zamora*. (3) The action was tried before Bailhache J., who held that the defendant could not justify taking the timber under the Defence of the Realm Regulations, but could justify under the right of angary, which involved payment by the Crown of full compensation to the claimants. Accordingly the learned judge gave judgment for the defendant.

The claimants then presented a claim for compensation to the War Compensation Court upon the footing that the Timber Controller had requisitioned their timber under His Majesty's right of angary. The questions then arose: (1.) Whether, assuming that the timber had been seized under that right, the War Compensation Court had any jurisdiction to award compensation to the claimants; and (2.) whether compensation ought to be assessed on the principle laid down in reg. 2 B. The Court held (1.) that they had jurisdiction; (2.) that the claimants had no legal right to compensation apart from the Indemnity Act, 1920, within the meaning of s. 2, sub-s. 2 (iii.) (*a*), of that Act, and (3.) that the principle of compensation was either that prescribed by reg. 2 B or that prescribed in Part II. of the Schedule to the Act.

The claimants appealed.

(1) The material Regulations and sections of the Indemnity Act will be found in the note at the end of this report.

(2) (1920) 36 Times L. R. 526.

(3) [1916] 2 A. C. 77, 101.

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

R. A. Wright K.C., *A. T. Miller K.C.* and *Le Quesne* for the appellants. The War Compensation Court were wrong in holding that the appellants had no "legal right to compensation apart from this Act," within the meaning of s. 2, sub-s. 2 (iii.) (*a*), of the Indemnity Act, 1920. The conditions upon which the owner of requisitioned property is entitled to compensation are laid down in s. 2, sub-s. 1, of that Act, and the material conditions for the present purpose are when direct loss or damage has been sustained by reason of interference with his property in the United Kingdom through the exercise or purported exercise during the war: (1.) of any prerogative right of His Majesty; (2.) of any power under any enactment relating to the defence of the realm, or any regulation made or purporting to be made thereunder. If the damage is sustained by reason of interference through the exercise of a regulation made or purporting to be made under an enactment for the defence of the realm, then if the regulation lays down any principle of assessment, compensation is to be paid upon that principle: s. 2, sub-s. 2 (i.). In any other case, including the case where the interference is an exercise of a prerogative right, then, if the claimant would apart from the Act have had a legal right to compensation, the tribunal assessing compensation must give effect to that right and to the other matters mentioned in s. 2, sub-s. 2 (iii.) (*a*). In the present case the former alternative need not be considered. The seizure of the timber could not have been justified as an exercise or even a purported exercise of the only defence of the realm regulations suggested as authorizing it—namely, regs. 2 B and 2 J J. Those regulations could never have been intended to authorize the seizure of neutrals' property against their will and in spite of their protests, and the offer of such a price as the party seizing thinks fit, which is in effect the compensation specified in reg. 2 B (*b*). The seizure then must have been in exercise of a prerogative right of His Majesty. The prerogative rights of the Crown include the right of angary, which enables the Crown to seize the property of neutrals within its jurisdiction in time of war for the defence of the realm, making full

compensation therefor : *The Zamora.* (1) This was the power under which Bailhache J. held the timber was seized, and it is submitted that the judgment of the learned judge was right. The claimants then had prima facie a legal right to compensation apart from the Indemnity Act. It is true that the right is a right against the Crown which can only be asserted by a petition of right, but such a right must be contemplated by s. 2, sub-s. 2 (iii.) (*a*), because the words " in any other case " only relate to cases of interference with the claimant's property by acts done on behalf of His Majesty ; the words assume that the interference may give rise to a " legal right to compensation," and there is no legal right against the Crown except such as can be asserted by a petition of right.

[The Attorney-General admitted that " a legal right to compensation " within s. 2, sub-s. 2 (iii.) (*a*), included a right which a British subject might have to redress against the Crown by way of petition of right.]

There is no difference for this purpose between a British subject and a neutral seeking redress in the Courts of this country. It follows that compensation ought to be assessed on the principle laid down in s. 2, sub-s. 2 (iii.) (*a*), and that the decision of the War Compensation Court was wrong.

Sir Patrick Hastings A.-G. and *Bowstead* for the respondents. Angary is a matter of international law and the adjustment of rights and liabilities consequent upon its exercise are matter of diplomatic arrangement between the Sovereign who has seized the goods and the Sovereign of the alien who complains of the seizure. The seizure of this timber was an act of State. If an act of State is done on behalf of the Crown and is either authorized before it is done or ratified after it is done, it becomes the act of the Crown ; the actual agent is not liable in respect of it, and any remedy there is must be sought against the Crown : *Buron* v. *Denman* (2) ; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (3) ; *Feather* v. *The Queen* (4) ; *Phillips* v. *Eyre* (5) ; *Cook* v. *Sprigg* (6) ;

(1) [1916] 2 A. C. 77, 101.
(2) (1848) 2 Ex. 167, 188 et seq.
(3) (1859) 13 Moo. P. C. 22, 75.
(4) (1865) 6 B. & S. 257, 296.
(5) (1870) L. R. 6 Q. B. 1, 23.
(6) [1899] A. C. 572.

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Poll v. *Lord Advocate* (1); *West Rand Central Gold Mining Co.* v. *The King* (2); and an alien not resident in this country can only do this through his own Sovereign by diplomatic means. It is said that an act of State must be committed abroad in order to give protection: see Cobbett's Leading Cases on International Law, 4th ed. (1922), p. 18, but the only authority for this proposition is a dictum in *Johnstone* v. *Pedlar*. (3) An act of State, whether done in this country or abroad, gives no cause of action to a non-resident alien. Therefore if this timber was seized in exercise of a prerogative right the claimants would in the circumstances not have any legal right apart from the Indemnity Act, 1920, and therefore by s. 2, sub-s. 2 (iii.) (*b*), compensation must be assessed according to the measure prescribed by Part II. of the Schedule to the Act.

But it is not necessary to decide that point, because it is clear that the seizure was in exercise or at the worst in purported exercise during the war of a regulation made or purporting to be made under an enactment relating to the defence of the realm—namely, Defence of the Realm Regulation 2 B, and accordingly compensation must be paid according to the measure prescribed by that regulation: see Indemnity Act, 1920, s. 2, sub-s. 2 (i.). The decision of the War Compensation Court was therefore right and ought to be affirmed.

R. A. Wright K.C. in reply. The right of angary, with its attendant duty to give full compensation to the foreigner whose goods have been seized, has been recognized by the municipal Courts of this realm. That involves the right of the foreigner to appeal to our municipal Courts to enforce payment of the compensation. An act of State in the real sense gives no right to compensation, and cannot therefore include any act of the Crown done in pursuance of the right of angary. There is some essential difference between the two acts, and the difference is that the latter is done within the realm and the former without. The opinions of the learned

(1) (1899) 1 F. 823, 827. (2) [1905] 2 K. B. 391, 408.
(3) [1921] 2 A. C. 262, 271.

Lords in *Johnstone* v. *Pedlar* (1) to this effect, so far from being obiter dicta, are necessary steps on the way to the conclusion that the plaintiff in that case had a good cause of action. "As between the Sovereign and his subjects there can be no such thing as an act of State": Stephen's History of the Criminal Law (1883), vol. ii., p. 65; and "subjects" here includes "aliens living in 'temporary allegiance' under the protection of English law; therefore an act of State in this sense cannot take place in England in time of peace, and not easily in time of war, for it seems that even an alien enemy resident here with licence is under the same protection: *Porter* v. *Freudenberg* (2), as an alien friend certainly is: *Johnstone* v. *Pedlar*" (3): see Pollock on Torts, 12th ed. (1923), p. 112, note (*c*). The result is that the appellants, having a legal right to compensation apart from the Indemnity Act, are entitled to have that compensation assessed under s. 2, sub-s. 2 (iii.) (*a*).

Cur. adv. vult.

July 15. The following written judgments were delivered:—

BANKES L.J. This appeal comes before the Court under very exceptional circumstances. The appellants are a company registered under the laws of Egypt who carry on business at Alexandria as timber merchants and importers. The company has no place of business in the United Kingdom or in any British Dominion. In the ordinary course of their business the company had purchased a cargo of timber in Finland, and just before the outbreak of war had loaded the cargo on a British vessel which they had chartered to carry the timber to Alexandria. On the outbreak of war the vessel was unable to continue her voyage and took refuge in a port in Finland. The appellants made arrangements with the shipowner under which the cargo was to be retained on board until such time as the vessel could resume her voyage. In or about the month of July, 1917, while the vessel was still in the port of refuge, she was requisitioned by the Shipping Controller and brought to this country with part of the cargo

(1) [1921] 2 A. C. 271, 277, 278, 297.

(2) [1915] 1 K. B. 857.

(3) [1921] 2 A. C. 262.

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Bankes L.J.

on board; the remainder of the cargo having been transferred to two other British vessels which had also been requisitioned, and by which it was carried to this country. After the arrival of the vessels the cargo was discharged, and by notices dated respectively August 28, October 3, and October 31, 1917, the timber was requisitioned by the authorities. All three notices are signed by or on behalf of the Controller of Timber Supplies. In the first notice it is stated that it was the Army Council who took possession of the timber referred to in that notice. In the second and third notices it is intimated that the Board of Trade intend to take possession of the timber referred to in those notices. All three notices purport to be given under the powers conferred by the Defence of the Realm Regulations. The bringing of the timber to this country and the subsequent requisitioning of it were done without any authority from and against the expressed will of the appellants, who commenced an action in the Commercial Court against the Timber Controller personally, claiming (inter alia) a declaration that the requisition of the cargo was ultra vires and void. The Timber Controller pleaded that his action was justified under regs. 2, 2 B and 2 J J of the Defence of the Realm Regulations, or alternatively that in taking possession of the cargo he acted on behalf of the Crown in the exercise of the Royal prerogative for the defence of the realm, and of the right of angary. The learned judge who tried the action held that the regulations relied on had no application to the case of the goods of a neutral brought to this country against his will, and that the seizure of the timber could be justified only as an exercise of the right of angary, which carried with it the right to full compensation. The learned judge made a declaration in accordance with his judgment. The case is reported as *Commercial and Estates Company of Egypt* v. *Ball.* (1) No judgment appears to have been drawn up, and the claimants have not attempted to take any advantage of the decision, which falls within the protection of s. 1, sub-s. 4, of the Indemnity Act, 1920, and which therefore is not affected by that Act. The correctness of Bailhache J.'s

(1) 36 Times L. R. 526.

decision must necessarily be considered when dealing with this appeal. Personally I see no reason for thinking that it is not correct. As a result of the events which had happened, and of the decision of Bailhache J., the claimants had two courses at least open to them. They might have accepted the view that the timber was seized under the right of angary, and proceeded to present their claim to His Majesty's Government through the ordinary diplomatic channel, or they might present a claim for compensation to the War Compensation Court under the provisions of the Indemnity Act, 1920. The claimants have in fact adopted a somewhat intermediate course ; they have presented a claim to the War Compensation Court, and in their claim they have inserted a reservation in the following terms : " In the event of the claimants failing to obtain adequate compensation herein the claimants intend to present and reserve to themselves the right of presenting their claim to His Majesty's Government through diplomatic channels." Whether this is an indication that the claimants intend, if they fail in getting all they want by a decision of the War Compensation Court, to ignore that decision and adopt the course of proceeding by diplomatic negotiation, or whether they intend to endeavour to supplement any compensation awarded to them by the War Compensation Court by an appeal through diplomatic channels, is not clear. What however is quite clear is that the claimants have submitted their claim to a tribunal whose authority to deal with it is statutory, and whose powers of awarding compensation are strictly defined and limited.

It will be convenient at this point to consider what the authority and powers of the tribunal are. These are to be found in the Indemnity Act, 1920, and they are called into existence partly because of the restrictions on the taking of legal proceedings imposed by s. 1 of the Act, and partly for the purpose of substituting a new tribunal for the Board of Arbitration, and for the Defence of the Realm Losses Commission. The Act divides the compensation which may be awarded by the War Compensation Court under three heads and two sub-heads. The first head, s. 2, sub-s. 2 (i.), deals

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Bankes L.J.

with the case where the act which gives rise to the claim for compensation has been done under a regulation or order made or purporting to be made under any enactment relating to the defence of the realm, where the regulation or order provides some special principle for the assessment of any payment (including any price to be paid), or compensation or the rate thereof. In such a case the payment or compensation is to be assessed in accordance with that principle or rate. The second head, s. 2, sub-s. 2 (ii.), deals with cases of requisitioned ships, which it is not material to consider. The third head, s. 2, sub-s. 2 (iii.), deals with all other cases and divides them into two sub-heads—namely, (*a*), cases where the claimant would apart from the Act have had a legal right to compensation, and (*b*), cases where the claimant would not have had such a right.

As the first step in the present proceedings the War Compensation Court were asked to decide two preliminary questions: (1.) Whether the War Compensation Court had any jurisdiction to award compensation to the claimants, and (2.) if they had, then whether such compensation ought to be assessed on the principle laid down in reg. 2 B of the Defence of the Realm Regulations or on what other principles. This second question really asked the Court to decide under which head they would assess compensation. The decision of the Court was: (1.) That they had jurisdiction, and (2.) That the case did not fall within the first sub-head of the third head of compensation, but they left for future consideration the question whether it fell within the first head or within the second sub-head of the third head. There is no appeal on the question of jurisdiction, nor could there well be, as, whether justified or not, the seizure of the timber purported to have been made during the war under a regulation purporting to have been made under an enactment relating to the defence of the realm. These facts gave the War Compensation Court jurisdiction under s. 2, sub-s. 1 (*b*), to entertain the claim, if the claimants elected to lay it before them, and from this point of view it was unnecessary to consider whether the seizure, though purporting to be made under

the Defence of the Realm Regulations, must be justified (if at all) under the right of angary.

The points of law upon which the claimants appeal raise directly only the questions: (*a*) whether the claimants apart from the Indemnity Act had a legal right to compensation, and (*b*) whether the claimants on the facts were entitled to full compensation. Indirectly however the appeal necessarily raises the question, whether the principle on which compensation is payable is that contained in reg. 2 B, because if it is the other questions do not arise. On this point my decision is in the claimants' favour, and on this short ground. The claimants' claim as presented to the War Compensation Court is a claim for damages—their particulars indicate this quite clearly. Reg. 2 B does not deal with claims for damages at all, but with the price to be paid for goods acquired by the Authority after possession taken. This may seem to be a technical distinction between the two cases, but in my opinion the claimants are entitled to a strict interpretation of a regulation which is said to deprive them of a common law right. This construction of the regulation renders it unnecessary on this point to consider the question of the regulation being ultra vires, or of its effect upon the goods of a neutral which are in this country against his will.

It remains therefore to consider the question whether the claimants would, apart from the Indemnity Act, have had a legal right to compensation. If they had then s. 2, sub-s. 2 (iii.), of the Act provides that "the tribunal shall give effect to that right, but," it goes on, "in assessing the compensation shall have regard to the amount of the compensation to which, apart from this Act, the claimant would have been legally entitled, and to the existence of a state of war and to all other circumstances relevant to a just assessment of compensation: Provided that this sub-section shall not give any right to payment or compensation for indirect loss." The words which I have just read negative the suggestion that the claimants can have any fuller right of compensation than these words authorize. The utmost compensation that the War Compensation Court can possibly award must be arrived at in

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Bankes L.J.

accordance with the principle thus laid down. Whether the Court is at liberty to adopt this principle depends upon whether upon the true construction of the sub-section the claimants would, apart from the Act, have had a legal right to compensation. In other words, whether if the Act had never been passed the claimants would have had a right to compensation enforceable in the Courts of this country in accordance with the municipal law of this country. In considering this question it is necessary to determine under what authority the seizure was made. It purported to have been made under the authority of reg. 2 B. I agree with the view taken by Bailhache J. that the regulation cannot be read as having any application to the case of a neutral whose goods are brought to this country without his authority and against his will. The seizure of the claimants' goods must be attributed to some lawful authority, if such an authority exists. Bailhache J. attributed it to the right of angary, which was one of the grounds upon which the defendants, when represented by the law officers, justified their action. In my opinion the view taken by the learned judge was correct. In the case of *The Zamora* (1) Lord Parker discusses the origin and refers to recent applications of the right of angary. He says: "It would be anomalous if the international law by which all nations are bound could only be ascertained by an inquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own, and has not recognized the right of each nation to apply its own municipal law. The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognized by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognized as involving an obligation to make full compensation"—and he then goes on to refer to recent instances of

(1) [1916] 2 A. C. 77, 100.

the exercise of the right. Is the right thus described by Lord Parker a branch of international law which constitutes part of the law of the land? Lord Alverstone's judgment in the *West Rand Central Gold Mining Co.'s* case (1) deals with this question as follows. He says: "The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations."

Accepting this as a correct statement of the law it would seem that the Courts of this country, apart from the Indemnity Act, would not have hesitated at the instance of a neutral to have administered the law of angary in its entirety had the neutral taken the proper steps to claim the exercise of their jurisdiction. In the present case we are relieved from any difficulty arising from the fact that any claim against the Crown can only be enforced as a matter of grace by way of petition of right, because the Attorney-General stated that he was

(1) [1905] 2 K. B. 391, 406.

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Bankes L.J.

prepared to admit that if a subject would, but for the Indemnity Act, on taking the proper steps and obtaining the necessary fiat, have had a right to proceed by way of petition of right to enforce a claim for compensation against the Crown, he would have had a "legal right to compensation" within the meaning of s. 2, sub-s. 2 (iii.) (*a*), of the Indemnity Act.

Upon the grounds therefore that in my opinion the seizure of the claimants' goods can only be justified under, and must be attributed to, the right of angary, and that that right is so well established in international law that it forms part of the municipal law of this country, and that for the present purpose no importance is to be attributed to the fact that proceedings can only be taken by way of petition of right, I consider that the appeal must be allowed with costs, and a declaration made that the assessment of compensation in this case must be made upon the principle laid down in s. 2, sub-s. 2 (iii.) (*a*), of the Indemnity Act, 1920. The assessment is, of course, entirely for the War Compensation Court, who cannot travel outside the limits of their jurisdiction, even though the rule of international law may contemplate something more complete by way of compensation. A claimant who seeks the enforcement of our municipal law is bound by the limitations imposed by that law.

SCRUTTON L.J. The real question in dispute in this appeal is whether the claimants are to be paid for their timber, which the Crown has requisitioned, its full market value at the time of requisition or a lesser value as calculated in the language of reg. 2 B of the Defence of the Realm Regulations or the second Part of the Schedule to the Indemnity Act, 1920.

The facts raising the question are shortly as follows. The claimants, an Egyptian company, having no place of business in the United Kingdom, had before the war in 1914 bought certain timber in the Baltic and made charters under which it was to be conveyed to Alexandria. The timber was at the outbreak of war loaded in the Baltic in a British ship, the *Falls of Nith*. The ship naturally was unable to get out of the Baltic, and for a further payment it was agreed that the

goods should be retained in the ship there till she could complete her chartered voyage. In the Baltic the ship stayed till early in 1917, when the British Government said, first on April 15 that they were going to use her, secondly on May 2 that they were going to requisition her. They were told on April 17, and again on May 24, that there was cargo on board for Alexandria, for which they must take responsibility. They did not answer the first letter, and said to the second letter that if the vessel was brought out of the Baltic they "would make the necessary arrangements with the cargo owners." The latter objected to any dealing with their cargo. The British Government however brought the cargo to England, using part of it as cargo or ballast for two other steamers. They did not send it on to Alexandria, but when and as the cargo was discharged from each steamer, requisitioned it by notices in September and October, 1917. The requisition is in each case stated to be "In pursuance of the powers conferred on them by the Defence of the Realm Regulations," and the Board of Trade state on September 20, 1917, that it was requisitioned under reg. 2 B. The claimants protested against the requisition, as the Government did not propose to pay the then market value of the cargo, but only an amount assessed under reg. 2 B. On February 11, 1918, the claimants issued a writ against Sir J. B. Ball, the Timber Controller, claiming that the requisition was invalid, and on March 25, 1918, the defendant by the legal representatives of the Government, while justifying the seizure under the Defence of the Realm Regulations, said, as far as I can see for the first time, that alternatively, "In taking possession of the goods he acted for and on behalf of His Majesty in the exercise of his Royal prerogative for the defence of the realm and of his right of angary." The latter plea, which probably astonished the claimants, relates to the right claimed by belligerents to seize the goods of neutrals necessary for the prosecution of the war, found on the territory of or occupied by the belligerent, on paying fair compensation. The case came on for trial before Bailhache J. on April 19, 1920, when that learned judge held that the seizure was not authorized by reg. 2 B,

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Scrutton L.J.

which did not apply to goods of a neutral, which were only in the kingdom against the will of the neutral, but was justified by what he called "the Royal prerogative of angary." In that case compensation would be payable by the Crown, who were not parties to the action; and the learned judge therefore concluded: "It is no use my making a declaration as to the principle on which compensation is to be assessed, because the Crown is not formally a party to this action, and a declaration made by me in an action against Sir James Ball would be of no effect in a petition of right to which the Crown would be a party. All I can do, therefore, is to say that in my judgment Sir James Ball was within his rights upon the ground I have stated in my judgment. That ground carries with it the right of full compensation for the timber which has been taken." He gave no costs to anybody, and no one drew up his judgment formally; it apparently would be merely "Judgment for the defendant." No one appealed against any part of the judgment.

Then was passed the Indemnity Act, which came into force on August 16, 1920. Its first section discharged any proceeding already begun and prevented any further proceeding, including petitions of right, in respect of any act done in good faith and done or purporting to be done for the defence of the realm. This provision would only be necessary in the case of illegal, unjustifiable, or ultra vires acts. Having imposed this restriction, the Act by s. 2, sub-s. 1 (*b*), went on to give a person who had sustained any direct loss by interference with his property, "through the exercise or purported exercise" of any prerogative right of His Majesty, or of a power under any regulation made "or purporting to be made" under any enactment relating to the defence of the realm, a right to payment or compensation for such loss to be assessed on the principles and by the tribunal thereafter mentioned. There seems to be no doubt that the goods in question here were requisitioned by the "purported exercise" of power under a regulation "purporting to be made" under the Defence of the Realm Act, phrases which clearly include a seizure under an ultra vires regulation or a seizure unauthorized

by the regulation under which it purported to be made, and that the claimants were prohibited from bringing any legal proceedings, including a petition of right, in respect of that loss, except a claim before the War Compensation Court recognized by the Act. I cannot follow the view that seizures not authorized by a regulation, or authorized by an ultra vires regulation, are not covered by the Indemnity Act. They seem to me just the class of seizures in respect of which, if made honestly, the Act was intended to give indemnity. The decision of Salter J. in the *Newcastle Brewery* case (1), that part of reg. 2 B was ultra vires, had already been given on February 12, 1920. Next s. 2, sub-s. 2, provided (*i.*) that the compensation referred to, that is compensation for loss by unauthorized seizure, under any order purporting to be made under the Defence of the Realm Act, should be assessed under the special principle contained in the regulation and with consideration to any matter which the Court was entitled to consider under the regulation. The damage was to be met by the payment, including price, or compensation mentioned in the regulation. I do not see how the fact that the claim is for damages can exclude the method of compensating for damage by paying a prescribed price. Lastly it was provided by s. 2, sub-s. 2 (iii.), that, "In any other case," i.e. (inter alia), any other than a case where the loss was under an order purporting to be made under a regulation purporting to be made under the Defence of the Realm Act, "compensation," if the claimant would but for the Indemnity Act have had "a legal right to compensation," should be assessed so as to give effect to that right. I suppose that is the meaning of the extraordinarily vague language used in that sub-section.

The claimants then went before the War Compensation Court, and said that they had but for the Indemnity Act "a legal right to compensation," whether the seizure was in pursuance of a right of angary, because the exercise of that right involved the payment of compensation, or whether it was under the Royal prerogative, in which event the *De*

(1) [1920] 1 K. B. 854. See however *Robinson & Co.* v. *The King* [1921] 3 K. B. 183.

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Scrutton L.J.

Keyser's Hotel case (1) decided that they had a legal right to compensation: or, if they did not recover by legal right, that, as Bailhache J. had held the seizure to be bad under reg. 2 B, they were entitled to compensation under Part II. of the Schedule to the Act. The Crown contended that the seizure was good under reg. 2 B, that if not it was justified by the right of angary which, being a right only under international law, and not a right of His Majesty's prerogative under municipal law, was not in 1917 enforceable by a national Court, but only by diplomatic means, so that, if the claimants were not limited to the compensation under reg. 2 B, they had no claim which the War Compensation Court could enforce. No formal judgment of the War Compensation Court was drawn up. I think this is unfortunate; we originally had difficulty because it was not clear what decision on questions of law the Court gave. Now that the members of the Court give judgments stating the legal reasons for their decision, I think it desirable that the formal result of that decision should be recorded in an order. We are told that the first judgment we are furnished with is that of Sir Francis Taylor, and that it was stated in Court that Sir M. Wallace agreed with the result; the second judgment is that of Sir Plunket Barton. Each judgment declines to decide whether in 1917 a right of angary was "a prerogative right of His Majesty," but the two judgments agree in holding that if it was, no legal right of compensation resulted therefrom, but only a right under international law enforceable by diplomatic means. Each judgment reserves to the hearing the question whether the measure of compensation is that of reg. 2 B, or of Part II. of the Schedule to the Act. The first judgment says clearly that the compensation is for purported exercise of a power under a Defence of the Realm Regulation.

It appears that the judgment appealed from was given to determine preliminary questions of law—namely, (1.) whether the War Compensation Court had any jurisdiction to hear the claim; (2.) what was the proper principle of compensation. I take the decision of the Court to be that they had jurisdiction

(1) [1920] A. C. 508.

to hear a claim for loss by interference with property through an act done in purported exercise of a right under a Defence of the Realm Regulation, and that no other claim was supportable; that the principle of compensation was either that of reg. 2 B or that of Part II. of the Schedule to the Act, and that they reserved the question which was right; but that no claim for compensation for interference with a legal right apart from the Indemnity Act was open to the claimants.

In my view the claim was one for direct loss by reason of interference with the claimants' property in the United Kingdom through the purported exercise during the war of a power under a regulation purporting to be made under an enactment for the defence of the realm. If Bailhache J.'s view of the scope of reg. 2 B and if Salter J.'s view of the ultra vires character of the provisions for compensation in reg. 2 B are right, these words exactly and truthfully describe what has happened. If either judge is wrong, it is only necessary to substitute "exercise" for "purported exercise" and "made" for "purporting to be made," and the case is still covered by the words of s. 2, sub-s. 1 (*b*), of the Act. If so, the rate of compensation is expressly provided by s. 2, sub-s. 2 (i.), of the Act, which in my view establishes the statutory validity, if it were necessary to establish it, of the provision as to compensation in reg. 2 B. The subsequent provision in s. 2, sub-s. 2 (iii.), is only "in any other case," and does not apply to a case coming within s. 2, sub-s. 2 (i.). If this view is right the Court had power to award compensation for the seizure which expressly purported to be made under reg. 2 B, on the principle stated in that regulation, and had no other power. On this view it is unnecessary to decide whether the exercise of a right of angary gave a claim for compensation legally enforceable in a Court of law or by a petition of right, or whether the right of angary is part of the Royal prerogative. This seizure when made did not purport to be made by the right of angary, but was expressly stated to be made under the Defence of the Realm Regulations. In that case the Indemnity Act has provided the measure of

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Scrutton L.J.

compensation, the same whether the seizure was or was not justified by the regulations or whether the regulations were or were not justified by the powers of the Act, provided always that the seizure purported to be made under the regulation, and the regulation purported to be made under the Act. This appeal should therefore be dismissed with costs. The War Compensation Court will proceed to assess compensation on the principles of reg. 2 B.

I should add that the claimants did not rely on any dealings with the cargo outside the realm for the probable reason that on the authority of such cases as *Buron* v. *Denman* (1) a claim by a foreigner for such acts would be successfully met by the defence that the interference was an act of State. Counsel for the Crown argued that a seizure within the realm of the property of a foreign person who was not within the realm by consent of the Sovereign was also an act of State. It is unnecessary to decide this in the view I have taken of the case, but it will take a great deal of argument to persuade me that, apart from action justified by statute, the defence that an act is an act of State is open to the Sovereign or the executive within the realm. The language used in *Johnstone* v. *Pedlar* (2) appears to be inconsistent with such a view.

ATKIN L.J. The facts in this case are that the plaintiffs, a company registered in Egypt, had in the year 1913 bought large quantities of timber in Finland to be delivered f.o.b. at a Finland port. Early in 1914 they entered into a charter-party with Edward Lloyd & Co., Ld., a British company owning British ships, for the transport of the timber from Finland to Alexandria. In pursuance of the contract of purchase and of the charterparty the goods in question in this action were loaded before the war on a ship the *Falls of Nith*, for carriage to Alexandria. The outbreak of war prevented the ship from sailing to Alexandria, and she remained with the timber on board lying at a Finland port until the year 1917. In that year the British Government requisitioned the ship, the *Falls of Nith*. The ship passed into the control of the

(1) 2 Ex. 167. (2) [1921] 2 A. C. 262.

Government on June 30, 1917, and was directed to proceed to England. The plaintiffs, the cargo owners, protested, but their protests were without avail, and in or about September, 1917, the *Falls of Nith* arrived in this country with the bulk of the plaintiffs' cargo on board. Some had been discharged at the port of sailing by order of the Government and loaded on other vessels also requisitioned by the British Government. The whole of the original cargo thus arrived in this country. On arrival it was requisitioned by the Timber Controller, purporting to act under the Defence of the Realm Regulations. On being asked to specify the particular regulation under which he acted, the reply received, dated September 20, 1917, was that the defendant was advised that his action was covered by reg. 2 B. On February 11, 1918, the plaintiffs commenced an action against the Timber Controller for a declaration that the requisition was ultra vires, and for an order for the return of the goods, and alternatively for compensation based on the value of the goods at Alexandria at the time of requisition, 97,732*l.*, or in the further alternative damages for conversion. The defendant, who was represented by the law officers of the Crown, instructed by the solicitor for the Board of Trade, justified under the Defence of the Realm Regulations 2, 2 B, and 2 J J ; and alternatively on the Royal prerogative and His Majesty's right of angary. The action was tried before Bailhache J. The Attorney-General, the Solicitor-General, and Mr. Branson appeared for the defendant. The learned judge held that the defendant could not justify under the Defence of the Realm Regulations, but could justify under the right of angary, and as he could not award compensation in an action against the defendant personally, he gave judgment for the defendant on April 19, 1920. On August 16, 1920, the Indemnity Act, 1920, was passed, which by s. 1 prohibited legal proceedings, including proceedings by way of petition of right in respect of any act done during the war in good faith by any one in the service of the Crown in the execution of his duty. It is conceded that this section precluded any recourse by the plaintiffs to the Courts of law in respect of the requisition of their goods. The

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Atkin L.J.

Act however by s. 2 gives a right of recourse to the War Compensation Court under conditions which will have to be considered, and to that Court the plaintiffs duly made a claim for compensation. The claim was made on February 13, 1922, and in para. 3, after setting out the facts, alleges that the Timber Controller requisitioned the timber in pursuance of His Majesty's right of angary. No other ground of claim is in the formal document suggested. The War Compensation Court appear to have directed a preliminary hearing of the claim to determine the following questions: (1.) Whether the Court had any jurisdiction to award compensation to the claimants; (2.) If so, whether the compensation ought to be assessed on the principle laid down in reg. 2 B or on what other principles. Sir Francis Taylor, with whose judgment Sir Matthew Wallace appears to have agreed, decided that the Court had no power to award compensation for goods taken under the right of angary, as that right was not a prerogative right, and therefore was not within the terms of s. 2 of the Indemnity Act, and he further decided that the plaintiffs' only claim was in respect of reg. 2 B; that the compensation must either be assessed on the principles contained in s. 2, sub-s. 2 (i.), or s. 2, sub-s. 2 (iii.) (*b*), of the Act. Sir Plunket Barton did not find it necessary to decide that the right of angary was not a prerogative right, but held that if it were, so as to give the Court jurisdiction, the plaintiffs would have no legal right to compensation, but could only have compensation assessed under s. 2, sub-s. 2 (iii.) (*b*). In other respects he agreed with the other members of the Court. The material questions are whether the plaintiffs can now assert, as the law officers alternatively asserted for the Timber Controller in 1920, and as Bailhache J. decided, that their goods were seized under the right of angary; and, if so, whether the exercise of that right is the exercise of a prerogative right of His Majesty so as to give to the War Compensation Court jurisdiction under s. 2, sub-s. 1 (*b*), and in that case whether the exercise of the right of angary gives the plaintiffs a "legal right to compensation" within the meaning of s. 2, sub-s. 2 (iii.) (*a*).

In my opinion the judgment of Bailhache J. was correct, and the Timber Controller could only justify his seizure of these goods under the right of angary. The claim to seize under the Defence of the Realm Regulations seems to me ill-founded. The words of the regulation are no doubt wide enough to cover these goods and any goods wherever in the world situate. Some limitation is necessary, and I think that the power given to seize with a proviso restricting the payment of full compensation was not applicable to goods of a neutral brought to this country by the order of the British Government against the will of the neutral owner. That the Government should have power to requisition ships of its subjects, even when situate abroad and loaded with the goods of neutrals, is one thing; but that the Government should have power to compel the shipowners to convey to this country whatever goods of neutrals are in the ship, and should then have power to seize without full compensation the goods, which in this way alone have come within their jurisdiction, is quite another matter. Neutrals who have not sought the protection of this country, even temporarily, either for themselves or their goods, have no particular interest in the defence of this realm; and I cannot think that it was within the power of the authority making regulations under the Defence of the Realm Act to make regulations which affected such neutrals. On the other hand there is a well ascertained right of a belligerent Sovereign to take possession of the property of neutrals so found within his territory or territory occupied by his forces for the purposes of warfare. This is the right of angary. It appears to me to be well recognized by the conventions of civilized nations, which constitute the body of international law, and it is equally clear that it is only so recognized on the footing that the Sovereign so exercising this right makes full compensation for the property he so seizes. The precise nature of the title to compensation conferred on the neutral owner must be considered later. At present I only refer to the right of angary with its accompanying obligation to make compensation, as an indication that where there is a well recognized conditional power to

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Atkin L.J.

seize the property of neutrals agreeable to international usage, it would be wrong, unless no other construction is possible, to construe general words in domestic legislation, so as to confer a similar power over the goods of neutrals absolved from the condition of paying compensation, and on that ground not consonant with international usage. I come to the conclusion therefore that the Timber Controller could not seize the goods in question under the Defence of the Realm Regulations, but could seize them under the right of angary; and that his acts should be imputed to a legal authority rather than an illegal; and that it must be taken therefore that the claimants' goods were taken under the right of angary.

The next question is whether this right is a "prerogative right of His Majesty." This seems to me to admit of little doubt. The phrase has to be construed as occurring in an Act passed in 1920 in respect of acts done in the execution of duty or for the defence of the realm by a person employed in the service of the Crown. The prerogative has been stated by Professor Dicey, in a passage which I think has now become authoritative, as "nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": Dicey, Law of the Constitution, 8th ed. (1915), p. 420. I have no doubt that the phrase in s. 2, sub-s. 1 (*b*), of the Indemnity Act is used in this sense; and I have also no doubt that in this sense it covers the right of angary. I conclude therefore that the War Compensation Court have under the statute jurisdiction to award compensation to any one who has suffered a direct loss from the exercise of that right.

The remaining question is whether such a person would apart from the Indemnity Act have a legal right to compensation. If so, the compensation must be assessed by the tribunal in accordance with the provisions of s. 2, sub-s. 2 (iii.) (*a*). If not, compensation is to be assessed in accordance with the provisions of Part II. of the Schedule. In order to controvert the legal right to compensation it was contended by the Attorney-General that the right of angary is a right only recognized by international law. I have already impliedly

negatived this in holding that it is a prerogative right, but I must deal with the argument more fully, together with its further development, that the obligation to make compensation is equally an obligation only recognized by international law, which can only be enforced by State action of the Sovereign of the neutral owner, and cannot be enforced or recognized by the municipal Courts of this country. This argument appears, with respect, to be fallacious. The right of angary of the Sovereign is a right recognized by our municipal law, giving rise to rights and obligations in the full sense. The simplest illustration that can be given is the successful plea of the Timber Controller in the action brought against him by the present claimants. He established his immunity by showing authority from the Crown under the right of angary. If no such power in the Crown was recognized by the municipal law of this country, the defendant would have remained with an undefended liability for conversion of the timber. Once the goods are seized under the right of angary, the property or the right to possession passes from the neutral owner to the Crown by our municipal law. The Crown could enforce in the Courts of this country the ordinary rights coming from that property or possession against any trespasser; and similarly the original owner or his assignee would fail in the municipal Courts to establish his rights against any person dealing with the goods who derived title, or the right of possession, through the Crown. International law as such can confer no rights cognizable in the municipal Courts. It is only in so far as the rules of international law are recognized as included in the rules of the municipal law that they are allowed in the municipal Courts to give rise to rights or obligations. The right of angary therefore is a right recognized by English law, and falls within the definition of Professor Dicey as a right legally left in the hands of the Crown. Does it give rise to "a legal right to compensation" in the owner of the goods seized? It is plain that one of the conditions of the right of angary as recognized by international law is that full compensation shall be made to the neutral owner. I see no reason for holding that our municipal law recognizes the right

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Atkin L.J.

to seize, but rejects the obligation to compensate. So to hold would be to impute to our law a remarkable distinction between its treatment of those subject to British law and neutrals not so subject. In the former case municipal law by a series of statutes, if not by the common law, provides for compensation either in full or with some restrictions when the subject's property is taken for the defence of the realm. Lord Parker's dictum to the contrary in *The Zamora* (1), delivered after the decision in *In re A Petition of Right* (2), and before the decision in *Attorney-General* v. *De Keyser's Royal Hotel* (3), is no longer justified by the authorities. It would indeed be remarkable if our law granted compensation to subjects who had a direct interest in the defence of the realm and denied it to neutrals whose goods were here against their will. It was contended that the sole right to compensation was the right of the Sovereign of the injured neutral to claim compensation on behalf of his subject. I can see no reason for any such restriction. Prima facie the only two persons concerned are the owner of the goods and the belligerent Sovereign ; and if the belligerent Sovereign submits to a legal obligation to pay compensation to his own subjects, I see no reason why he should be exempt from such an obligation to a neutral. No doubt international usage would justify the Sovereign of the neutral owner in claiming on behalf of his subject if fair compensation was withheld. This is usual practice between States and does not depend upon the absence of legal right in the neutral to sue in the municipal Courts of the country where he has been wronged in person or property. It may well be that in some States the municipal law does not recognize the right to compensation, either by denying its existence or by reason of its procedure not admitting process against the Sovereign. In our law legal rights can be put in action against the Sovereign by petition of right, and it was, as I think, rightly conceded by the Attorney-General that apart from the Indemnity Act, if a petition of right could have been brought for compensation in this case, the claimants

(1) [1916] 2 A. C. 77, 100. (2) [1915] 3 K. B. 649.
(3) [1920] A. C. 508.

must be held to have a legal right to compensation. I think that a petition of right would so lie. I know of no reason for supposing that it would not lie at the suit of a neutral, and I come to the conclusion that the claimants have a legal right to compensation. I am strengthened in this opinion by the reflection that to hold the opposite would be to bring our municipal law into conflict with international usage in a matter where a priori principles of justice seem to support the latter, and where expediency alone would seem to make it advantageous to the belligerent to accept liability.

In my opinion, therefore, the appeal should be allowed and the case should be heard by the War Compensation Court on the footing that the claimants have a legal right to compensation for the seizure of their timber under the right of angary. What the precise measure of compensation will be it is not for us to consider. It will not be measured by the principles laid down in 2 B or 2 F. On the other hand, the Court will take into account in the words of s. 2, sub-s. 2 (iii.) (*a*), the existence of a state of war, and all other circumstances relevant to a just assessment of compensation.

I wish to deal shortly with one or two other contentions raised by the Crown. One was that the action of the Timber Controller was an act of State, the loss caused by which gave no right to the claimants and could be determined by no tribunal. I have already negatived this view, but I confess myself at present unable to appreciate how such a defence arises in respect of an act done within the realm. The point seems to be disposed of by the decision in *Johnstone* v. *Pedlar*. (1) The other contention was that, if the loss arose from the purported exercise of power under a Defence of the Realm Regulation, the only measure of compensation was the measure prescribed by that regulation, whether the purported exercise of the power was or was not justified by the words of the regulation, or whether the regulation or the relevant parts of it dealing with compensation were or were not ultra vires. In the view I have taken of this case it is unnecessary to decide these points; but I am not at present prepared to

(1) [1921] 2 A. C. 262.

C. A. 1924

COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Atkin L.J.

accept the view that s. 2, sub-s. 2 (i.), operates so as to validate both acts of officials and regulations which would otherwise be ultra vires. Full effect would be given to the sub-section by confining it to cases where the principles of compensation were laid down in valid regulations regularly applicable to the acts complained of. Regulations " purporting to be made " under the statute may well have been introduced to cover questions of defect of form or procedure in the making. I do not, as at present advised, think that they cover defects of substance.

For these reasons I think that the appeal should be allowed with costs, and the case remitted to the War Compensation Court to be dealt with in accordance with the terms of the declaration stated by Bankes L.J.

Appeal allowed.

Solicitors for appellants : *Thomas Cooper & Co.*

Solicitor for respondents : *The Solicitor to the Board of Trade.*

NOTE.

Defence of the Realm Regulations Consolidated, 1917.

Reg. 2. " It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do—

(*a*) to take possession of any land . . . .

(*b*) to take possession of any buildings or other property . . . .

(*c*) to take such steps as may be necessary for placing any buildings or structures in a state of defence ;

(*d*) to cause any buildings or structures to be destroyed, or any property to be moved from one place to another, or to be destroyed ;

(*e*) to take possession of any arms, ammunition, explosive substances, equipment, or warlike stores (including lines, cables, and other apparatus intended to be laid or used for telegraphic or telephonic purposes) ;

(*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid." . . . .

Reg. 2 B. " It shall be lawful for the Admiralty or Army Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the protection thereof.

" Where any goods, possession of which has been so taken, are acquired by the Admiralty or Army Council or the Minister of Munitions, the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined.

"In determining such price regard need not be had to the market price but shall be had— . . . .

(*b*) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive . . . . and to any other circumstances of the case; so, however, that if the person from whom the goods are acquired himself acquired the goods otherwise than in the usual course of his business, no allowance, or an allowance at a reduced rate, on account of profit shall be made:

Provided that where by virtue of these regulations or any order made thereunder the sale of the goods at a price above any price fixed thereunder is prohibited the price assessed under this regulation shall not exceed the price so fixed. . . . .

Reg. 2 F.—(1.) The Food Controller may make orders regulating, or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of, or other dealing in, or measures to be taken in relation to any article (including orders as to maximum and minimum price) where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country, and making such provisions as to entry, inspection, or otherwise as appear to him necessary or expedient for the purpose of his duties.

(2.) The Food Controller may by order require all or any persons owning or having power to sell or dispose of any article, or any stocks thereof, to place at the disposal of the Controller the article, or the whole or any part of the stocks thereof, as may be directed by the Controller, on such terms as he may direct, and to deliver to the Controller or to any person or persons named by him the article or stocks in such quantities and at such times as the Controller may require, where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country.

Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time.

(3.) Any order under this regulation may be made either so as to apply generally, or so as to apply to any special locality, or so as to apply to any special supplies of any article or to any special producer, manufacturer, dealer, or person. . . . .

2 J J.—(1.) The Board of Trade shall have the like powers as are given to the Food Controller under Articles 2 F to 2 J inclusive as respects any article of commerce to which the powers of the Food Controller under those regulations do not extend, where it appears to the Board necessary or expedient to exercise any of those powers for the purpose of encouraging or maintaining the supply of any such article which is required by the public or by any section of the public, and those regulations shall apply accordingly. . . . .

C. A.
1924
COMMERCIAL AND ESTATES CO. OF EGYPT v. THE BOARD OF TRADE.

Indemnity Act, 1920, s. 2, sub-s. 1. Notwithstanding anything in th foregoing section restricting the right of taking legal proceedings, any person not being a subject of a State which has been at war with His Majesty during the war and not having been a subject of such a State whilst that State was so at war with His Majesty— . . . .

(*a*) being the owner of a ship or vessel . . . .

(*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage;

and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final: Provided . . . .

Sub-s. 2.—The payment or compensation shall be assessed in accordance with the following principles:—

(i.) Where under any regulation or order made or purporting to be made under any enactment relating to the defence of the realm, any special principle for assessment of any payment (including any price to be paid) or compensation or the rate thereof, is contained in the regulation or order, such payment or compensation shall be assessed in accordance with that principle or rate: Provided that nothing in this provision shall prevent the tribunal in assessing the payment or compensation from taking into consideration any circumstances which, under the regulation in question, it would have been entitled to take into consideration. . . . .

(iii.) In any other case, compensation shall be assessed as follows:—

(*a*) If the claimant would, apart from this Act, have had a legal right to compensation, the tribunal shall give effect to that right, but in assessing the compensation shall have regard to the amount of the compensation to which, apart from this Act, the claimant would have been legally entitled, and to the existence of a state of war and to all other circumstances relevant to a just assessment of compensation: Provided that this sub-section shall not give any right to payment or compensation for indirect loss.

(*b*) If the claimant would not have had any such legal right, the compensation shall be assessed in accordance with the principles upon which the Commission appointed by His Majesty under Commissions dated March 31, 1915, and December 18, 1918 (commonly known as the Defence of the Realm Losses Commission), has hitherto acted in cases where no special provision is made as to the assessment of compensation, which principles are set forth in Part II. of the Schedule to this Act." . . . .

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1924
Oct. 15.

S. SCHNEIDERS AND SONS, LIMITED *v.* ABRAHAMS.

[1924. S. 732.]

Landlord and Tenant—Rent Restriction—Recovery of demised Premises—Conviction of Tenant—"Using premises for illegal or immoral purpose"—Receiving stolen Goods—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4.

By s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, no judgment for the recovery of possession of any dwelling-house to which the Act applies shall be given "unless .... (*b*) the tenant .... has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose." ....

The landlords of a dwelling-house within the Act gave their tenant notice to quit. Before the date of the notice the tenant had been convicted under s. 33 of the Larceny Act, 1916, of receiving at the demised premises certain property of the landlords well knowing the same to have been stolen. Notwithstanding that user of premises forms no essential part of this crime:—

Held, that the tenant, having made use of the premises in order to commit the crime of which he had been convicted, had been "convicted of using the premises for an illegal purpose" within the meaning of s. 4 of the Act of 1923.

To bring a tenant within the section it is not necessary that the user of the premises for an illegal purpose should be continuous or frequent.

Judgment of Talbot J. reversed.

Appeal from the judgment of Talbot J.

By a verbal agreement made on or about June 1, 1918, the defendant, a working tailor, became tenant to the plaintiffs, who were manufacturing tailors, of a dwelling-house, No. 127 New Road, Whitechapel, on a weekly tenancy at the rent of 3*l.* a week. On January 20, 1922, it was verbally agreed between the parties that the rent should thenceforward be increased to 4*l.* a week. On November 30, 1923, the plaintiffs gave the defendant notice to quit, expiring on December 31, 1923. The defendant refused to give up possession.

On February 20, 1924, the plaintiffs issued a specially indorsed writ in the High Court claiming possession of the premises and took out a summons for leave to sign judgment

C. A. 1924

S. SCHNEIDERS & SONS, LD. v. ABRAHAMS.

for possession under Order XIV. The plaintiffs' affidavit in support of the summons contained the following paragraph :—

"6. The defendant was on September 21, 1923, at the Court of Summary Jurisdiction sitting at the Thames Police Court convicted of receiving on September 17, 1923, at the said premises one roll of Italian cloth valued at 5*l.* well knowing the same to have been stolen or unlawfully obtained, the property of the plaintiffs, and was sentenced to five weeks' imprisonment," contrary to s. 33, sub-s. 1, of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50). The premises were, by reason of their rateable value, within the provisions of the Rent Restrictions Acts, 1920 and 1923.

The Master in chambers gave the defendant leave to defend and ordered the case to be tried as a short cause.

The case was tried before Talbot J.

The defendant relied on s. 4 of the Rent Restrictions Act, 1923. (1) The plaintiffs contended that the defendant had been "convicted of using the premises for an . . . . illegal purpose" within the meaning of that section. Talbot J. gave judgment for the defendant on the ground that the words "using the premises" implied a continuous or systematic user.

The plaintiffs appealed.

Pritt for the appellants. The learned judge was wrong in holding that to constitute a user of the premises "for an

(1) Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 4 : "The following section shall be substituted for s. 5 of the principal Act" [i.e., the Rent (Restrictions) Act, 1920], namely :—

"5.—(1.) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless—(*b*) the tenant or any person residing or lodging with him or being his sub-tenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose, or the condition of the dwelling-house has, in the opinion of the Court, deteriorated owing to acts of waste by or the neglect or default of the tenant or any such person, and, where such person is a lodger or sub-tenant, the Court is satisfied that the tenant has not, before the making or giving of the order or judgment, taken such steps as he ought reasonably to have taken for the removal of the lodger or sub-tenant" . . . .

illegal purpose" within the meaning of s. 4 of the Act of 1923 there must be a continuous user. There is nothing in the Act to warrant such a construction. If premises are used once for the commission of an illegal act, for example, for harbouring a criminal, or for concealing stolen goods, surely that is enough to justify the landlord in getting rid of a weekly tenant who has so used the premises. Talbot J. relied on *Waller & Son* v. *Thomas* (1), but that case is distinguishable. There the premises were being used for a lawful purpose of a licensed public-house. On one occasion the tenant sold intoxicating liquor within prohibited hours. It was held that this did not constitute "using the premises for an . . . . illegal purpose." Lush J. said (2): "Those words refer to putting a house to an improper use to carry out an unlawful purpose." The present case comes exactly within that interpretation of the words.

The section cannot be given a very strict meaning. It provides that no order for the recovery of possession shall be made "unless—(*b*) the tenant . . . . has been convicted of using the premises . . . . for an immoral or illegal purpose." Strictly speaking the offence of "using premises for an . . . . illegal purpose" in so many words, is not an offence known to the law; and still less is there an offence of using premises for an immoral, not being also an illegal, purpose. Where a strict construction of the words is impossible a reasonable construction must be given, and the section may be reasonably read thus: "Unless the tenant . . . . has been convicted of a crime and has used the premises or allowed them to be used for an immoral or illegal purpose in the process of committing it." In a case very like this, *Birmingham Young Men's Christian Association* v. *Gee* (3),

(1) [1921] 1 K. B. 541.

(2) [1921] 1 K. B. 550.

(3) Unreported. July 30, 1924. A shorthand note of the judgment was read to the following effect:—

LORD DARLING. This appeal must be dismissed. The county court judge took the right view of the case. The tenant was in arrear with her rent, and notice to quit was given. The legislation being what it is, that did not entitle the landlords to get rid of her; but after that something happened which enabled the landlords, though she was a statutory tenant, to get rid of her. That was because she was convicted as a receiver of stolen goods in this house

C. A. 1924

S. SCHNEIDERS & SONS, LD. v. ABRAHAMS.

Lord Darling and Rowlatt J. sitting as a Divisional Court decided that landlords, whose tenant was convicted of receiving property knowing it to have been stolen and had received it on the demised premises, were entitled to an eviction order.

The Hon. Sir Reginald Coventry K.C. and *J. H. Watts* for the respondent. The judgment appealed from should be affirmed. The object of the Legislature in passing s. 4 (*b*) of the Act of 1923 was to prevent depreciation of the demised premises. A conviction for using the premises for the purpose of betting with persons resorting thereto, contrary to s. 1 of the Betting Act, 1853 (16 & 17 Vict. c. 119); or for using the premises or wilfully permitting them to be used for unlawful gaming, contrary to s. 4 of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38); or for suffering gaming to be carried on in the premises (if they are licensed premises), or using them in contravention of the Betting Act, 1853, either of which is an offence under s. 79 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24); any of these would bring the premises into disrepute and any one of them would be within a strict reading of s. 4 (*b*) of the Rent Restrictions Act, 1923. But when a strict reading gives an intelligible meaning, even though it be a limited meaning, the words of an enactment cannot be altered so as to give it a wider meaning. The locus in quo is not of the essence or substance of the crime of receiving stolen property. Furthermore, to constitute an offence of "using" premises for an unlawful purpose more than one unlawful act is necessary: *Powell* v. *Kempton Park Racecourse Co.* (1); *Jayes* v. *Harris* (2); *Waller & Son* v. *Thomas.* (3)

[SCRUTTON L.J. referred to *Powell* v. *Kempton Park Racecourse Co.* (4)]

Counsel was not called upon in reply.

in which it is alleged that the man was who stole the property. Thereupon she lost the protection given by the Rent Restrictions Act, 1923, and by s. 4 (*b*) the landlords became entitled to get an eviction order

ROWLATT J. agreed.

(1) [1899] A. C. 143, 172.
(2) (1908) 99 L. T. 56.
(3) [1921] 1 K. B. 541.
(4) [1899] A. C. 160.

C. A.
1924
S.
SCHNEIDERS & SONS, LD. v. ABRAHAMS.

BANKES L.J. This case raises a short but important point upon the meaning of certain words in s. 4 of the Rent Restrictions Act, 1923, which leave the intention of the Legislature in considerable doubt. The appellants brought an action to recover possession of premises of which the respondent was tenant. The premises were within the scope of the Rent Restrictions Acts. The respondent relied on the provisions of those Acts in answer to the claim for possession. In reply to this the appellants contended that the case fell within s. 4 (*b*) of the Act of 1923 and relied on the facts that the respondent had been convicted of receiving property stolen from them, and had received it on the demised premises, as disentitling the respondent to the protection of the Act. The effect of s. 4 (*b*) is that no judgment for the recovery of possession of any dwelling-house to which the Act applies shall be given unless, among other conditions, "the tenant . . . . has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose." . . . . The question is whether on the true construction of those words the respondent has in these circumstances been convicted of using the premises for an immoral or illegal purpose. First, a doubt arises whether the Legislature is using those words in reference to an offence, the gist of which is the user of premises; whether the user of the premises is an essential element in the constitution of the offence, so that the user must be charged in the indictment and the offence must be described therein as the offence of using the premises for some purpose being an immoral or illegal purpose; or whether it is enough that the user should be not an essential element, but merely an incidental circumstance of the offence. Secondly, assuming that the latter is the intention of the Act, is it enough to disentitle the tenant to protection that he should have once used the premises for an immoral or illegal purpose, or is a continuous or frequent user necessary? The actual conviction in the present case was for receiving on September 17, 1923, at 127 New Road, Whitechapel, one roll of Italian cloth, well knowing the same to have been stolen or unlawfully obtained, the property of

C. A. 1924

S. SCHNEIDERS & SONS, LD. v. ABRAHAMS.

Bankes L.J.

the appellants. To constitute the offence of receiving goods knowing them to be stolen it is not necessary that the receiving should be on any premises, but incidentally the receiving in this case took place on these premises. Is this such an offence as is contemplated in s. 4 (*b*) of the Rent Restrictions Act, 1923 ?

In looking for the intention of the Act it is material to consider what class of offences would be included, if the words were given a strict technical construction which would limit their application to those offences in which the user of premises is an essential element. The number of those offences is comparatively small. There are offences for " keeping " premises for this or that immoral purpose, which would not come within a technical construction of " using " premises ; and yet keeping the demised premises as a brothel would surely be within the contemplation of s. 4 (*b*). Again, if the tenant had fitted up the demised premises as a coiner's den, and had been caught and convicted of falsely making or counterfeiting coin contrary to s. 2 of the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), he would not be within a strict construction of s. 4 (*b*), because the user of premises is no part of that offence. And inasmuch as a strictly technical construction of s. 4 of the Act of 1923 would exclude so many offences which would seem naturally to fall within the purview of the section, and because such a construction would deprive the words " or immoral " of all force or effect, therefore I reject the argument that the section includes only offences in which user of the premises is an essential element. But I think it is necessary to show that the tenant has taken advantage of his tenancy of the premises and of the opportunity they afford for committing the offence. In this view the tenant who uses the demised premises as a coiner's den, or as a deposit for stolen goods, and is convicted of counterfeiting coin or receiving goods, would be " convicted of using the premises for an . . . . illegal purpose " within the meaning of s. 4.

That disposes of the more difficult question. The second point was that when the statute refers to " using the premises," it intends something more than a single act of user and means

a continuous, frequent, or repeated use. I cannot assent to that suggestion. It may be that the mere fact of a crime being committed on the premises would not constitute a user of the premises by the tenant for an illegal purpose; for example, if the tenant was convicted of an assault upon some one who happened to be on the premises in the occupation of the tenant, and if that were the only evidence, I doubt whether the tenant could be said to have been convicted of "using the premises for an . . . . illegal purpose" within the meaning of s. 4. But if the tenant uses the premises as a coiner's den or as a deposit for stolen goods, a single instance of such user seems to me quite enough to satisfy the language of the statute. Reference was made to *Waller & Son* v. *Thomas* (1) in the Divisional Court as supporting the opinion of Talbot J. In my view there is a clear distinction between the facts of that case and those of the present. The offence there was the offence of selling intoxicating liquor on licensed premises within prohibited hours; it was said that this constituted using the premises for an illegal purpose. The Court held that the premises being licensed premises the user was a lawful user, and that it was only by a slip in the user that the offence was committed. Lush J. makes it clear that this was his view. He said (2): "There was only one case of sale within prohibited hours, and I do not think that an isolated breach would be sufficient to justify the learned judge in holding that the house was used for an illegal purpose. Those words refer to putting a house to an improper use to carry out an unlawful purpose." McCardie J. said (3): "As to Mr. Wootten's suggestion that the defendant came within s. 5, sub-s. 1 (*b*)"—of the Act of 1920—"by allowing the premises to be used for an 'illegal purpose,' I agree with Lush J. that the object of this clause (s. 5, sub-s. 1 (*b*)) is to deal with cases in which the improper user of the premises is in furtherance of an unlawful purpose, and not with an isolated instance of illegality in carrying out a lawful purpose." The effect of the particular offence committed in that case is now

(1) [1921] 1 K. B. 541. (2) [1921] 1 K. B. 550.
(3) [1921] 1 K. B. 552.

C. A. 1924

S. SCHNEIDERS & SONS, LD. v. ABRAHAMS.

specially dealt with in s. 4 (i.) of the Act of 1923; but the distinction between that case and the present is not thereby weakened. We are told that in another case of *Birmingham Young Men's Christian Association* v. *Gee* (1) the Divisional Court has taken the view which I have expressed. For the reasons I have given I think this appeal should be allowed.

SCRUTTON L.J. The vague language of s. 4 makes it very difficult to discover what it is intended to apply to. It is inapplicable to many conditions and circumstances which would seem prima facie to be within the purview of the enactment. The difficulty of interpretation is due to absence of technical drafting.

In this case the landlords desire to eject their weekly tenant because the tenant has been convicted of receiving on the demised premises goods which were stolen from the landlords, and if ever there was a good reason for evicting a tenant this is one. As enabling them to do so they point to s. 4 of the Rent Restrictions Act, 1923, which prevents them from recovering possession unless the tenant "has been convicted of using the premises . . . . for an immoral or illegal purpose." What is the meaning of those words, "convicted of using the premises"? Is the crime which exposes the tenant to the risk of ejectment the crime that he has used the premises? Does the crime, to come within s. 4, involve the user of premises for some immoral or illegal purpose, or is it enough if the tenant has been convicted of an illegal act which in fact takes place on the premises, although the conviction is not recorded as a conviction for using the premises for that or any other purpose? The words "using the premises . . . . for an immoral . . . . purpose" are very curious, because a defendant cannot be convicted of using premises for an immoral purpose which is not also illegal. If the section means that the conviction must be for using the premises, the difficulty is that there are very few crimes that can be properly so described and brought within its operation. If the tenant used the premises as a disorderly house that

(1) Unreported. See ante, p. 303.

would not come within the section strictly construed, because the offence under s. 2 of the Disorderly Houses Act, 1752 (25 Geo. 2, c. 36), is not for using but for keeping a disorderly house. Did the Legislature use the words strictly so as to exclude a conviction for keeping a disorderly house? Or did it use the words in a looser sense? The words would appear to include an offence under s. 4 of the Gaming Houses Act, 1854, which does include the user of premises; also an offence under s. 79 of the Licensing (Consolidation) Act, for among the offences under that section is that of using premises in contravention of the Betting Act, 1853; and the words would include some offences under the Betting Act, 1853, itself, for it includes among other offences that of using a house or permitting it to be used for the purpose of betting. They would not cover the offence of counterfeiting coin nor the case of a woman who took the premises for the purpose of enticing foolish persons and extorting money from them by the threats of a bully; nor would they include the occupation of the house by notorious receivers of stolen property. Were the words meant to have their strict meaning or were they meant to cover all cases where a tenant is convicted of a crime and had used the premises to facilitate the commission of it? This interpretation would exclude cases where a crime had been committed, but the premises have no more than an accidental connection with the commission of the crime. It is difficult to choose between these two interpretations. On the one hand a judge is tempted to adhere to the strict meaning of words used in a statute, and to leave Parliament to correct the interpretation if it is not what was intended. On the other hand regard must be paid to the object to be attained by means of the words used; and I cannot imagine the intention of Parliament to have been that a tenant may use the demised premises for the purpose of committing a crime, that he should be apprehended on the premises and convicted of committing the crime, and yet that the landlord should be compelled to keep him as his tenant. The crime of receiving goods knowing them to have been stolen is a good instance of the difficulty

C. A. 1924

S. SCHNEIDERS & SONS, LD. v. ABRAHAMS.

Scrutton L.J.

raised by s. 4. There is no crime, and consequently there can be no conviction, of using premises for receiving stolen goods, and yet premises may be used for the purpose of receiving stolen goods. The rest of the wording of s. 4 suggests that such a user is within the contemplation of the section. Giving the case the best consideration I can, I come to the conclusion that the conviction need not be for using the premises for one or another immoral or illegal purpose, and that it is enough if there is a conviction of a crime which has been committed on the premises and for the purpose of committing which the premises have been used; but that it is not enough that the tenant has been convicted of a crime with which the premises have nothing to do beyond merely being the scene of its commission. For these reasons I am of opinion that the landlords are entitled to recover, and this appeal should be allowed.

ATKIN L.J. We are asked in this case by the tenant to give the words of the statute their precise meaning, and if there was a plain meaning to be attached to the words I should give them that meaning. The words to be considered are "unless the tenant . . . . has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose." I ask myself what is the meaning of those words? If they mean that the conviction must be in the terms used in the Act, that is, for "using the premises" for the purpose, the question arises, Is there an offence of using premises for an immoral purpose—for there is the alternative, immoral or illegal. I know of no offence which could be charged as "using" named premises "for an immoral purpose." The offence would have to be charged as "using" the premises for some specified purpose being an immoral purpose, or an illegal purpose, as the case may be. Then it is found that there are very few offences to which the charge would apply. The words would apply to using the premises for betting and gaming purposes, but not to using them as a brothel, because the offence under s. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), is that of keeping

a brothel and not of using premises as a brothel. Then the whole Act must be considered to ascertain the object of the Legislature. It specifies certain conditions under which a landlord may recover possession of the demised premises, and when those conditions are considered it seems an extraordinary conclusion that they should not include a case where the tenant takes the premises, fits them up as a coiner's den, uses them for that purpose, is apprehended on the premises, and is then charged with the offence of counterfeiting coin and convicted. This leads to the conclusion that the words of s. 4 must be used in a less technical sense. In my opinion they cover a case where the tenant has been convicted of a criminal offence, and in the course of the trial it has been proved that he used the premises for an immoral or illegal purpose. "Using" the premises in this section does not necessarily involve a continuous or repeated user. If the tenant formed the deliberate purpose of robbing a man, allured him into the premises and so used them for the purpose, it would be sufficient for the section if they were once so used. On the other hand if the premises are once used for an immoral or illegal purpose, it does not necessarily follow that they have been used for such a purpose within the section; for example a casual assault may be committed in the course of an innocent user. Moreover in my view the premises may be used for an immoral purpose within the meaning of the section without being used for an illegal purpose. Suppose a prostitute visits the premises and while there commits a theft or an assault for which she is prosecuted and ultimately convicted, and in the course of the proceedings it is proved that she used the premises for the purpose of prostitution, it might well be said that she had been convicted of using the premises for an immoral purpose within the meaning of the section. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Bartlett & Gluckstein.*
Solicitor for respondent: *H. T. Nicholson.*

W. H. G.

C. A.
1924
Nov. 14, 24.

[IN THE COURT OF APPEAL.]

BRIGHTON COLLEGE *v.* MARRIOTT
(Inspector of Taxes).

Revenue—Income Tax—Profits of Trade—Company incorporated not for Gain to carry on College—Charity—Exemption—Fees paid by Scholars exceeding Expenses of Education—Surplus, whether liable to Tax—Income Tax Act 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (*b*) : *Sch. D,* 1 (*a*) (*ii.*)—*Finance Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 32), *s.* 30, *sub-s.* 1 (*c*).

Brighton College was a company limited by guarantee incorporated in 1873 under the Companies Acts. The objects for which it was established were: (*a*) To continue with an improved constitution the Brighton College, which had been carried on since 1846 in Brighton; (*b*) to provide thereby a sound religious, classical, mathematical and general education in conformity with the doctrines of the Church of England; (*c*) the doing of all such other lawful things as were incidental or conducive to the attainment of the above objects. By the memorandum of association it was provided that the income and property of the College should be applied solely to the promotion of the objects of the College. No bonus or dividend was to be paid by way of profit to any member, though payment might be made for services rendered. The school had been carried on by the College in all ways in accordance with the memorandum and articles of association. Exemption from income tax had been obtained in respect of its public buildings, offices, and premises under No. VI. of Sch. A. Repayment of income tax had also been received by way of deduction on certain rents and dividends obtained and applied to the purposes of the College on the ground that the College should be treated as a trustee for charitable purposes. The surplus sums received from school fees had been applied in reducing mortgage indebtedness incurred in acquiring College property and in extensions and improvements. It was not necessary that parents of pupils should be shareholders or that pupils should be nominated by a shareholder. The College was assessed to income tax under Sch. D in respect of the profits made by it in carrying on the school. On appeal the assessment was upheld by the Commissioners, but their decision was reversed by Rowlatt J., who held that the College was immune from taxation as not being a trading society. On appeal by the Crown:—

Held, that the contracts made with the parents of pupils under which the fees were paid and paid for at a sum, as the accounts showed, not less, but rather more than the cost price of the services rendered, brought the activities of the College within the words of charge in Sch. D, 1 (*a*) (ii.) "in respect of the annual profits or gains arising . . . . from any trade," and justified the finding of the Commissioners that a trade was being carried on.

Held, therefore, that the College was assessable to income tax on the surplus of fees over current expenses.

Decision of Rowlatt J. reversed.

APPEAL from the decision of Rowlatt J. on a case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the above Commissioners held on January 11, 1923, for the purpose of hearing appeals, Brighton College appealed against an assessment to income tax in the sum of 2389*l.* for the year ending April 5, 1923, made upon it by the Additional Commissioners of Income Tax for the division of Brighton under the provisions of the Income Tax Acts.

1. The College was a company limited by guarantee established in the year 1873 under the Companies Acts, and its objects as declared by its memorandum were: (*a*) To continue with an improved constitution the Brighton College, which had been carried on since the year 1846, in Brighton. (*b*) To provide thereby a sound religious, classical, mathematical and general education, in accordance with the doctrines of the Church of England. (*c*) The doing all such other lawful things as were incidental or conducive to the attainment of the above objects.

2. By the memorandum of association it was provided that: "The income and property of the College, whencesoever derived, shall be applied solely towards the promotion of the objects of the College, as set forth in this memorandum of association; and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the persons who at any time are or have been members of the College."

By special licence of the Board of Trade the word "Limited" was omitted from the name of the College.

3. The school known as Brighton College, which was continued by the College, was founded as a public school in the year 1845 for the purpose of providing for the sons of noblemen and gentlemen a thorough liberal and practical education in conformity with the principles of the Established Church.

4. This school had been carried on by the College in all ways in accordance with the memorandum and articles of association. For the purposes aforesaid, the College had taken

C. A. 1924

BRIGHTON COLLEGE v. MARRIOTT.

over or acquired school, class-room, workshop, residential, and other premises, and employed a staff of masters and other persons for the instruction and care of the boys under its care.

5. Copies of the accounts of the College for the three years ending August 31, 1921 (which were annexed to and formed part of the case), sufficiently showed the nature of the receipts and payments made by the College in the course of so carrying out the objects for which it was established.

6. The College upon an appeal to the General Commissioners of Income Tax for Brighton had under No. VI. of Sch. A been exempted from income tax in respect of its public buildings, offices and premises.

The College had also received repayment of income tax charged by way of deduction upon certain rents and dividends which it had received and applied to the purposes of the College, on the ground that it fell to be treated as a trustee for charitable purposes.

7. The fees charged for attendance at the school carried on by the College had varied from time to time, and had in recent years produced surpluses, as shown in the first column of the following statement (which was set out in the case) :—

	1	2	3	4	
In 1910 .	£1268	£886	£—	£381	profit.
,, 1911 .	1548	1033	500	15 5*s.*	,,
,, 1912 .	1633	1013	500	119 5*s.*	,,
,, 1913 .	1515	994	500	20 5*s.*	,,
,, 1914 .	1583	1108	500	24	loss.
,, 1915 .	1371	1171	500	300 5*s.*	,,
,, 1916 .	1403	1151	500	248 5*s.*	,,
,, 1917 .	1781	1124	500	157	profit.
,, 1918 .	1901	1095	500	306 5*s.*	,,
,, 1919 .	2142	1064	1000	77 5*s.*	,,
,, 1920 .	1729	1031	—	697 5*s.*	,,
,, 1921 .	6468	1310	500	4657 5*s.*	,,

These surpluses had been to a large extent expended, as shown in the second and third columns of the above statement, in paying interest on mortgages and repaying mortgage

indebtedness, the said indebtedness having been incurred in acquiring property for and in extensions and improvements of the College rendered necessary by the large increase in the number of pupils. The fourth column of the above statement shows the net position after deducting the said interest and mortgage redemption.

8. It was not now necessary that the parents of pupils should be shareholders, and pupils were not required to be nominated by a shareholder. The privileges granted by cl. 9 of the articles of association, though still exerciseable and as a fact frequently exercised in past years, were no longer in use.

9. In these circumstances it was contended by counsel on behalf of the College at the hearing of the appeal :—

(1.) That the College was not carrying on any trade within the meaning of the Income Tax Acts or at all ;

(2.) That the council of the College was administering a charitable trust and was not carrying on a trade ;

(3.) That the income of the College consisted of (*a*) rents and profits derived from lands which were admittedly exempt from tax and (*b*) other annual payments which were applicable to charitable purposes only and were applied to charitable purposes only : see *Rex* v. *Special Commissioners of Income Tax ; Ex parte Shaftesbury Homes and Arethusa Training Ship* (1), and

(4.) That even if a trade were carried on it consisted of the work of education carried on by a charitable institution endowed to enable masters and boys to carry on that work, and the said work was " mainly carried on by the beneficiaries of the charity " within the meaning of s. 30, sub-s. 1 (*c*), of the Finance Act, 1921, and the profits were applied solely for the purposes of the charity and were exempt under that section.

10. These contentions were resisted by the inspector of taxes, who contended (inter alia) :—

(1.) That the College carried on a trade, profession, employment or vocation of providing education.

(1) [1923] 1 K. B. 393.

C. A. 1924

BRIGHTON COLLEGE v. MARRIOTT.

(2.) That the profits the subject of the said assessment were annual profits or gains arising or accruing to the appellant College from the said trade, profession, employment or vocation.

(3.) That the College was not a charity.

(4.) Alternatively, that the work in connection with the said trade was not mainly carried on by beneficiaries of the appellant College.

(5.) That the said assessment was correct and should be confirmed.

The Commissioners decided that a trade was being carried on, and after giving effect to certain agreed alterations, they amended the assessment to 2414*l.* and determined the appeal accordingly. It was agreed by both sides that in arriving at the liability of the College under Sch. D, the annual value of the buildings and offices upon which no tax had been levied under Sch. A by reason of the before mentioned decision of the General Commissioners of Income Tax should be deducted. They held that the Finance Act, 1921, s. 30, sub-s. 1 (*c*), did not apply to the profits so arrived at.

Rowlatt J. reversed the decision of the Commissioners, holding that the College was immune from taxation as not being a trading society.

The Crown appealed. The appeal was heard November 14, 1924.

Sir Patrick Hastings K.C. and *R. P. Hills* for the appellant.

Latter K.C. and *Edwardes Jones* for the respondent.

The arguments sufficiently appear from the case stated and from the judgments.

Cur. adv. vult.

Nov. 24. The following written judgments were delivered:—

POLLOCK M.R. This is an appeal by the Crown from a decision of Rowlatt J. dated June 27, 1924, whereby he reversed the decision of the Commissioners for the Special Purposes of the Income Tax Acts, who had decided that a trade or concern in the nature of trade was being carried on

by the College and had held it liable to pay income tax upon its profits.

Rowlatt J. held that the College was a non-trading society and did not come within the wide terms of Case I. of Sch. D. [His Lordship referred to the incorporation of the College, the objects for which it was established, and the provision in the memorandum of association above set out, and continued:] The College was granted a special licence of the Board of Trade to omit the word "Limited" from its name under s. 20 of the Companies (Consolidation) Act, 1908. The school has been carried on by the appellants in all ways in accordance with its memorandum and articles of association.

The Income Tax Acts provide special exemptions in favour of charitable bodies. "Charity," in its legal sense, comprises trusts for the advancement of education. Counsel for the Crown are content not to contest in this case the claim of Brighton College to be treated as a charity, although they guard themselves against such an attitude being taken as an admission that all similar institutions are to be treated as charities. The exemptions from tax which Brighton College has accordingly been allowed and received are in respect of its public buildings, offices and premises under No. VI. of Sch. A and repayment of income charged by way of deduction upon certain rents and dividends which it has received and applied to the purposes of the College. These exemptions, however, only serve to emphasize the fact that there is under the Income Tax Acts no general exemption for charities, as such, from income tax. Unless the charity can justify a claim to the particular exemption allowed in respect of tax collected under the several schedules, it remains liable to the tax.

Moreover it is clear that under income tax law the fact that profits when made are to be devoted solely to the advancement of the charity will not induce an exemption. Profits when made are subject to the tax, and their destination does not secure immunity for them. It is only necessary to refer to *Mersey Docks and Harbour Board* v. *Lucas* (1); *Coman* v.

(1) (1883) 8 App. Cas. 891.

C. A. 1924

BRIGHTON COLLEGE v. MARRIOTT.

Pollock M.R.

Governors of Rotunda Hospital, Dublin (1); and to *Trustees of Psalms and Hymns* v. *Whitwell* (2), in support of this proposition. In the *Rotunda Hospital* case (1) profits were derived from letting out rooms for entertainments, and in the *Trustees of Psalms and Hymns* case (2) the trustees sold a hymn-book at a profit. The profits were in the one case devoted to the hospital, in the other to widows and orphans; but as profits they fell under the tax, notwithstanding their charitable destination. The motive that brought them into existence does not matter.

Further a charity may carry on an activity severable from its charitable work, and if profits are made, they are taxable, as in the *Rotunda Hospital* case (1) and the *Trustees of Psalms and Hymns* case (2) already cited, and in *Grove* v. *Young Men's Christian Association* (3), where a restaurant was provided which catered not only for the members of the Young Men's Christian Association, but also for the public, and its profits were held not immune from taxation.

It was not seriously contended before this Court, although the contention was put before the Commissioners, that the College could, upon the facts found, claim the exemption provided by s. 30, sub-s. 1 (*c*), of the Finance Act, 1921, "if the work in connection with the trade is mainly carried on by beneficiaries of the charity."

Rowlatt J. pointed out in his judgment that in the present case there is no possibility of segregating a portion of the activities of Brighton College, such as the fees received from the students and the expenses of their education, and of treating that as a subsidiary activity—a severable trading concern; but applying that reasoning he decided that the whole concern was immune from taxation as not being a trading society at all. He treated the provisions contained in the memorandum of association which I have already referred to, that the income and property of the College shall be applied solely towards the promotion of the objects of the College, as indicating a non-trading body. The cases that I

(1) [1921] 1 A. C. 1. (2) (1890) 3 Tax Cas. 7.
(3) (1903) 4 Tax Cas. 613.

have referred to decide that that test is not exhaustive—even though it is an essential characteristic of a "charity." He treats the surplus realized, which the Crown seek to tax, as arising fortuitously in the course of the administration of the trust, and not derived of set purpose or design.

But can Brighton College be treated as the administration of a trust only—as a non-trading society?

In *Commissioners for Special Purposes* v. *University College of North Wales* (1) the income in question was derived from investments under a trust and devoted to various educational purposes and the general purposes of the college. No question arose as to fees received from the students, and the question decided was whether the college were entitled to one of the particular exemptions already referred to. In *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2) the exemption claimed and allowed was in respect of the income from trust estates—no other source of income was in question. The facts of the present case are far different. Fees are charged for attendance at the school which, in the years tabled in the case, have produced surpluses, varying in the ten years, 1910–1919, from about 1200*l.* to 2100*l.*, and in 1921 reached the figure of nearly 6500*l.* The surpluses have been used in paying interest on mortgages, or repaying mortgage indebtedness incurred in making extensions to, and improvements in, the College. The surpluses arose nevertheless from the contracts made between the College and the parents of pupils, and the fees payable under those contracts have been varied from time to time as circumstances determined the scale desirable.

Cotton L.J. said in *Erichsen* v. *Last* (3): "When a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business." That passage was quoted with approval by Lord Esher M.R. in *Werle & Co.* v. *Colquhoun*. (4)

(1) (1909) 5 Tax Cas. 408.
(2) [1891] A. C. 531; (1888) 22 Q. B. D. 296.
(3) (1881) 8 Q. B. D. 414, 420.
(4) (1888) 20 Q. B. D. 753, 759.

C. A.
1924

BRIGHTON COLLEGE v. MARRIOTT.

Pollock M.R.

In *In re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (1) the Council were held to be carrying on a trade in selling their publications. They were incorporated under the Companies Acts ; all the property and income were applicable solely to the promotion of the objects of the association—that is preparing and publishing, under gratuitous professional control, reports of judicial decisions. They held a licence under s. 23 of the Companies Act, 1867, dispensing them from using the word " Limited " after their name. They were held to be carrying on a trade or business. Lord Coleridge said (2) : " It is not essential to the carrying on of a trade that the persons engaged in it should make, or desire to make, a profit by it. Though it may be true that in the great majority of cases the carrying on of a trade does, in fact, include the idea of profit, yet the definition of the mere word ' trade ' does not necessarily mean something by which a profit is made." The case of *In re Arthur Average Association* (3) was cited to us ; but it is remote from the point that we have to decide. In so far as it dealt with the question of what is the meaning of carrying on business, it is an authority against the respondents. Sir George Jessel M.R. declared that the mutual association there in question carried on business with its members. " It is formed for the purpose of acquiring, first of all, the sums wanted for the expense of carrying it on, and, secondly, the sums to form a reserve fund at the end of the year "— facts which indicate a system not unlike that under which the fees paid in the present case are fixed, received and used.

Returning to the words of charge under Sch. D 1 (*a*) (ii.) the tax is charged " in respect of the annual profits or gains . . . . from any trade," and by s. 237 " ' trade ' includes every trade . . . . or concern in the nature of trade." The contracts made with the parents under which the fees are paid and paid for at a sum—as the accounts attached to the case prove—not less, but rather more, than cost price of the services rendered, in

(1) (1888) 22 Q. B. D. 279. (2) Ibid. 293.
(3) (1875) L. R. 10 Ch. 542, 547*n*.

my judgment, bring the activities of the College within the above words of charge and justify the finding of the Commissioners that " a trade was being carried on."

We have not to consider the case of a school where the education offered is paid for only in part by fees—the cost above what is received therefrom being defrayed out of trust or other funds. The present is a case where the full payment is made by those who send their sons to the institution. *Ex parte Shaftesbury Homes and Arethusa Training Ship* (1) bears no analogy to the present case. There, funds derived from trade were handed over to a trust for the education of poor children, and no fees were charged or received. The exemption under s. 37 (*b*) of the Income Tax Act, 1918, in respect of annual payments was held to apply, and the income was directed to be paid over without deduction.

For these reasons, in my judgment, the appeal of the Crown must be allowed with costs here and below and the assessment confirmed.

WARRINGTON L.J. The question in this case is whether the profits, that is to say, the surplus of income over expenditure, accruing to Brighton College from the carrying on of the undertaking of maintaining their school at Brighton are annual profits or gains accruing to them from a trade, profession, employment or vocation in respect of which income tax is charged under Sch. D of the Income Tax Act, 1918.

The Commissioners have answered the question in the affirmative, but their finding has been reversed by Rowlatt J. and the Crown appeals. [His Lordship referred to the constitution and objects of the company and the provision in the memorandum restricting the application of its income and property above set out, and continued :] This provision was inserted as an essential condition of the granting of a special licence by the Board of Trade for the omission of the word " Limited " from the name of the College.

It is admitted by the Crown, for the purposes only of the present argument, that the object for which the College was

(1) [1923] 1 K. B. 393.

C. A. 1924

BRIGHTON COLLEGE v. MARRIOTT.

Warrington L.J.

established is a charitable object within the meaning of the statute of Elizabeth.

The contention on the part of the College is that the object for which the school is carried on being charitable in the sense above mentioned, the profits in question are not profits or gains accruing to the College from any trade, profession, employment or vocation carried on by them.

In my opinion this contention cannot be supported on principle and is directly contrary to authority.

The College is open to the public generally, and it is not suggested that the fees payable by the parents or guardians are fixed on any different principle than such as would be adopted by an individual or a company carrying on such a school for profit on an ordinary commercial basis.

The profits accruing to such an individual or company would clearly be profits or gains accruing from the carrying on of a trade, profession, or vocation. Which of the three terms should properly be applied to such work is of course quite immaterial, inasmuch as they are all used in the description of profits under Sch. D. It matters not whether the person or company is regarded as supplying for reward an immaterial commodity, that is to say, the benefit of the education afforded to the pupils, or as performing for reward certain services actually rendered by the professional men—masters and so forth—employed in the work.

Unless therefore there is some circumstance which distinguishes the undertaking of the College from that of such an individual or company as is referred to above the profits in question would be profits of a trade, profession, or vocation. The only distinction suggested is that the object of the College is a charitable object, and that the profits are and must be devoted to that object and cannot be divided amongst the members. It is suggested that the business is not carried on with a view to profit, and that for this reason it cannot properly be treated as a trade or profession. This suggestion is not supported by the facts. If the accounts are looked at and the amount received for fees is compared with the amount expended in supplying the commodity or performing the services

in question the excess is so great that it is impossible to regard it as casual or accidental. The fact is, as I have already said, that the fees appear to be fixed on an ordinary commercial basis, so as not only to provide a safe margin as a security against loss, but to enable the College to expend money on the improvement and extension of what I may call without offence the plant employed in the business. But even if the suggestion could be supported in fact it would not in my opinion be of any avail in law. On this point I need only refer to the judgment of Coleridge C.J. in *In re Duty on Estate of Incorporated Council of Law Reporting for England and Wales.* (1)

But to return to the main contention, I should be of opinion that if the business of the College is in its nature a trade, profession, or vocation, it is none the less so that the profits, if any, derived from it are and must be devoted to the charitable object for which it is established.

This view is abundantly established by authority. I need only refer on this point to the well-known case of *Mersey Docks and Harbour Board* v. *Lucas* (2) and *Port of London Authority* v. *Inland Revenue Commissioners.* (3) These were cases of public bodies carrying on public undertakings the profits of which were to be devoted to improving the ports in the management of which they were respectively engaged.

But the same principle is in my opinion involved in the decisions in *Religious Tract and Book Society of Scotland* v. *Forbes* (4) and *Grove* v. *Young Men's Christian Association.* (5) With all respect to the learned judge I cannot think that the fact that the undertaking, the profits of which were in these cases held to be subject to tax, was in a sense separate from the main charitable undertaking was material. In each case the body in question was insisting that, by applying to the charitable purpose for which it was established the profits accruing from what was in its nature a trade, they escaped the liability for income tax in respect of the profits so applied.

(1) 22 Q. B. D. 279, 293.
(2) 8 App. Cas. 891.
(3) [1920] 2 K. B. 612.
(4) (1896) 3 Tax Cas. 415.
(5) 4 Tax Cas. 613.

C. A. 1924

BRIGHTON COLLEGE v. MARRIOTT.

Warrington L.J.

This was the real meaning of their contention that they were entitled to set off the profits of the trade against the deficiency on the charity account. Their contention was rejected in each case. These decisions were accepted and acted on in the House of Lords in *Coman* v. *Governors of Rotunda Hospital, Dublin.* (1) I can see no real distinction between the above mentioned cases and the present.

Nor is there in my opinion anything in the decision or the dicta in *Inland Revenue Commissioners* v. *Eccentric Club, Ld.* (2), inconsistent with the views I have expressed. That case was decided on its own facts and the judgments ought to be read in the light of those facts.

Unless therefore the profits in question are exempted by some statutory provision they are in my opinion profits chargeable with tax under Sch. D, falling within either Case I. or Case II., under which case is immaterial. There is no statutory exemption which applies to these profits.

The result is that in my judgment the appeal ought to be allowed, and the decision of the Commissioners restored with costs here and below.

SCRUTTON L.J. Brighton College was established to provide for the sons of noblemen and gentlemen an education in conformity with the principles of the Established Church. In 1873 it was taken over by a company whose memorandum of association provided that its income should be applied solely to the promotion of the objects of the College, and that no portion should be paid by way of dividend, bonus or profit to the members of the College, except as payment for services rendered. The governing body accordingly provide a school and equipment and enter into the usual contracts with parents who desire that their boys should be educated at the College. The parents are not necessarily or usually members of the company; in other words, the company makes contracts under which it supplies for payment education to the sons of other persons contracting with it. It was assessed for the year 1922–1923 in a sum of 2389*l.*, as profits of a trade carried

(1) [1921] 1 A. C. 1. (2) [1924] 1 K. B. 390.

on by it, and the Special Commissioners substantially confirmed the assessment on the ground that the company carried on a trade. Rowlatt J. reversed that decision on the ground that the company was not a trading body as a whole, and you could not find in their activities a subsidiary trade such as the bookshop in *Religious Tract and Book Society of Scotland* v. *Forbes* (1), the restaurant in *Grove* v. *Young Men's Christian Association* (2), or the entertainment hall in *Coman* v. *Governors of Rotunda Hospital, Dublin.* (3) The Crown appeal.

Sch. D (Cases I. and II.) taxes profits arising from a trade, profession, employment or vocation, and Case VI. taxes any annual profits and gains not falling under any other schedule. It is clear that a private schoolmaster would be assessed as carrying on a profession, but it has been decided in *William Esplen, Son & Swainston, Ld.* v. *Inland Revenue Commissioners* (4) that a limited company employing professional men to do professional work does not carry on a profession; it must be assessed if at all as carrying on a trade. It is also clear that if a trade is carried on the fact that the profits do not go to any individual but are employed for public or charitable purposes is immaterial.

In the present case the company habitually makes contracts with non-members to render educational services for which it receives payment to the full value of those services; and in the year of assessment these payments, after deducting the cost of supplying them, left profits or gains which the company applied in developing the school and furthering the purposes of the company.

The question seems to be whether these habitual transactions between the company and non-members constitute a trade. It is said they do not, because the purposes of the company are charitable, to promote education, and any gains the company makes are applied to those purposes.

The only express statutory allowances are that under s. 37 of the Act of 1918, a trust established for charitable purposes

(1) 3 Tax Cas. 415.
(2) 4 Tax Cas. 613.
(3) [1921] 1 A. C. 1.
(4) [1919] 2 K. B. 731.

C. A. 1924

BRIGHTON COLLEGE v. MARRIOTT.

Scrutton L.J.

only need not pay tax on yearly interest or other annual payment, which does not cover the present case; and that under the Finance Act, 1921, s. 30, the profits of a trade carried on by any charity are free from tax, if (1.) the work in connection with the trade is mainly carried on by beneficiaries of the charity, and (2.) the profits are applied solely to the purposes of the charity. The first ingredient is missing here, as it is impossible to regard the masters and officials of the company, paid salaries for their work, as beneficiaries of the company.

The question then is: "Do the company in carrying on the school carry on a trade?" In my view, when any person habitually and as a matter of contract supplies money's worth for full money payment, he "trades" within the meaning of Sch. D. It is the company's "business" to supply education; they bind themselves legally to supply it, and they have legal rights to be paid the full price for it. *Carlisle and Silloth Golf Club* v. *Smith* (1) shows that a transaction is not stopped from being a "trade" because it is a sporting one. I am unable to see that such a transaction as I have described, because the money's worth supplied promotes a charitable object, ceases to be a trade or business carried on on business lines and producing business profits. This is not a case where persons subscribe to enable transactions to be carried on, which could not be carried on by the commercial returns alone. There is no subscription test here, and the special case in twelve years shows nine years' profits amounting to 6431*l.* and three years' losses amounting to 573*l.*, while in the year of assessment the average of three years, after deducting Sch. A and B assessments, gives 2400*l.* profits.

I have considered the *Eccentric Club* case (2), by which of course I am bound. So far as one member of the Court thinks that a company cannot trade with its members, we have recently disapproved that ratio decidendi on the authority of the *Arthur Average Association* case (3) and *In re*

(1) [1912] 2 K. B. 177; [1913] 3 K. B. 75.

(2) [1924] 1 K. B. 390.

(3) L. R. 10 Ch. 542, 545*n.*

Padstow Total Loss and Collision Assurance Association (1), which were not cited to the Court of first instance. The case then rests on the view that a company supplying social amenities to its members does not trade. I imagine that, within the *Padstow* case (1) as an unregistered association of more than twenty members, the Eccentric Club would carry on business for gain of the company or its members. But I do not feel bound to extend the decision in the *Eccentric Club* case (2) from social amenities to educational advantages supplied for full payment, though for public purposes and with no object of individual gain. My respectful criticism on the judgment of Rowlatt J. is that I find in this case not a subsidiary and separate trade or business, but a business which is the whole object of the company, a business of supplying habitually and on business lines money's worth for full money value, which is not saved from being a business or trade by the fact that the profits derived from it are devoted to the improvement of the school and cannot be the subject of gain to the individual members. It seems to me that all and not part of the operations of the company are a business.

The case does not raise the question whether Sch. A assessment can be deducted from Sch. D profits, and I express no opinion on it. I may add that if not assessable under Case I. of Sch. D I should have thought the College was assessable under Case VI. of that schedule.

The appeal must be allowed with costs here and below and the assessment confirmed by the Commissioners restored.

Appeal allowed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Lingards, Browne & Myatt.*

(1) (1882) 20 Ch. D. 137. (2) [1924] 1 K. B. 390.

W. I. C.

C. A.
1924
Feb. 18, 19.

[IN THE COURT OF APPEAL.]

ROWNTREE AND COMPANY, LIMITED *v.* CURTIS (INSPECTOR OF TAXES).

Revenue—Income Tax—Sch. D—Trade Profits—Deductions—Sum set aside out of Profits to establish "Invalidity fund" for Employees—Trust Deed—"Money wholly and exclusively laid out or expended for the purposes of the trade"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch.* D, *Cases I. and II., r.* 3 (*a*).

In 1920, a company having had an unusually prosperous year in 1919, set aside out of its profits for that year a sum of 50,000*l.* for the establishment of an invalidity fund, the income of which was to be applied for the benefit of its employees, both men and women, in the alleviation of distress, invalidity, misfortune, etc. In June, 1921, a trust deed was executed by the company, which definitely settled the terms on which the 50,000*l.* was to be held by the trustees and the objects for which the fund was established. In computing the amount of the profits of its business for income tax purpose for the year ending April 5, 1921, the company claimed to deduct the 50,000*l.* The Commissioners found (1.) that the payment for the maintenance of its employees during invalidity constituted a continuous business demand in the business of the company having regard to the manner in which that business was conducted; (2.) that the primary object of the payment to the trustees of the 50,000*l.* was to establish a fund by setting aside a capital sum the income of which would be available to meet this demand; and (3.) that the actual amounts had not been ascertained at the time when the payment was made and were contingent and not capable of ascertainment. They accordingly disallowed the claim and their decision was upheld by Rowlatt J. On appeal:—

Held, that the 50,000*l.* was not money wholly and exclusively laid out or expended for the purposes of the company's trade within the meaning of r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, and could not therefore be allowed as a deduction for income tax purposes.

Hancock v. *General Reversionary and Investment Co.* [1919] 1 K. B. 25 distinguished.

Decision of Rowlatt J. affirmed.

APPEAL from the decision of Rowlatt J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Act, 1918, s. 149.

At a meeting of the above Commissioners, held on January 11, 1922, for the purpose of hearing appeals, Rowntree & Co., Ld., appealed against an assessment to income tax under Sch. D made upon them in the sum of 324,000*l.*,

less 21,628*l.* for wear and tear, in respect of their business of manufacturers of and dealers in cocoa, chocolate, and confectionery for the year ended April 5, 1921, under the provisions of the Acts relating to income tax. The sole question at issue in the appeal was whether in computing the amount of the profits of the business for income tax purposes a sum of 50,000*l.* should be deducted in the following circumstances.

Before the year 1920 the company had in existence two funds for the benefit of the persons employed by them—namely, a Pensions Fund and a Widows' Benefit Fund, besides a Death Benefit Fund. To these funds they had from time to time made payments of lump sums of money, and those payments had been habitually allowed as deductions for income tax purposes.

In 1920 the company, having had an unusually prosperous year in 1919, determined to establish a fund to be applicable for the relief and assistance of such persons, who were described in the rules afterwards established, as being "in such a physical or mental condition, owing to ill-health, overstrain, or other similar cause, as to be totally or partially incapable of doing their ordinary work," and it proposed to call that fund the Invalidity Fund. In pursuance of that determination, on March 29, 1920, the company sent a cheque for 50,000*l.* to three persons whom it had selected to be trustees of this fund, and it was the amount of that cheque which was the subject of the present appeal. The letter of the secretary of the company accompanying the cheque was as follows: "At the meeting of the directors held on February 4, 1920, it was decided to set aside definitely the sum of 50,000*l.* in order that the income therefrom might be used for the benefit of the employees of the company, both men and women, in the alleviation of distress, invalidity, misfortune, etc. The directors have not yet decided the exact form which the scheme for the administration of this Fund shall take, but they finally decided on behalf of the company to part with the possession and ownership of the amount with the object mentioned, and I am instructed to forward you the enclosed

C. A. 1924

ROWNTREE & Co. v. CURTIS.

cheque for 50,000*l.* to be held by you for that object. It is the intention thus to establish a charitable trust which can be framed and enforced altogether independently of the company. It is, however, the intention of the company as early as possible to lay down a detailed scheme providing for the application of the Fund, and I am desired to reserve power to the company to do so. Such scheme would be subject to your approval, or to the approval of a majority of you, and the company meantime reserves to itself the right to appoint additional or new trustees of the Fund."

The 50,000*l.* was invested in 7 per cent. Second Preference Shares of the company.

On June 7, 1921, a trust deed was executed by the company, which definitely settled the terms on which that sum of 50,000*l.* was held by the trustees and the objects for which the Fund was established. In the definition clause (cl. 1) "the Fund" was defined to mean and include the Invalidity Fund and all moneys, investments, property, and income which might from time to time be or become subject to the trusts thereby declared of or concerning the Invalidity Fund. Then, after provisions relating to the appointment and powers of the trustees, and the powers of the Committee who were to administer the Fund, the deed contained the following material clauses:—

Clause 4: "If at any time by reason of: (*a*) the company having ceased to carry on business or (*b*) any defect or incompleteness of the provisions of the trust deed or the rules, or (*c*) there being no applicant who in the opinion of the committee shall be suitable for a grant out of the Fund, or (*d*) any change in the financial position of the Fund or in the circumstances under which it is administered it shall appear to the trustees to be expedient so to do it shall be lawful for the trustees with the consent in writing of the company and the council either: (1.) to modify, add to, or abrogate the trusts or provisions of the trust deed or rules or to substitute other trusts or provisions therefor in such manner as with such consent they may determine, or (2.) to put an end to the said trusts and transfer the Fund to trustees of the Pension Fund of the company

constituted by the said trust deed dated the 30th of October, 1906, upon such trusts or conditions for the benefit of grantees as may be arranged or as an addition to their funds or to the trustees of the Widows' Benefit Fund of the company upon such trusts or conditions as aforesaid or as an addition to their funds provided that any such transfer shall not relieve the company from any of its liabilities in respect of either of such funds, or (3.) to deal with the Fund in such other manner for the benefit of some existing or future charity as may be determined by the trustees with such consent or authority as aforesaid."

Clause 5: "The trustees shall from time to time inform the committee of the amount of income of the Fund available for payment of grants including any accumulations of income for the time being in a state of investment, and the committee in the exercise of its powers under the trust deed and rules shall have regard to the amount so available and to the then present and probable future demands upon the Fund, and shall not without the express sanction of the trustees make any grant which would entail the payment by the trustees of any sum in excess of such amount."

Clause 6: "If it shall at any time or times appear to the trustees desirable or expedient so to do the trustees may with the express sanction of a joint meeting of the trustees and the committee have recourse to the capital of the Fund or such part thereof as may be specified in such express sanction for the purpose of paying grants, and any part of the Fund which it may be determined to have recourse to under this clause shall for the purpose of cl. 5 hereof be deemed to be income of the Fund."

The rules dealing with the making of grants were set out in a schedule to the trust deed.

The assessment appealed against had been made without the deduction of the sum of 50,000*l.* in computing the profits of the company.

On behalf of the company it was contended that the sum of 50,000*l.* was expended in the ordinary course of the company's business and was admissible as a deduction for the purposes

C. A. 1924

ROWNTREE & CO. v. CURTIS.

of income tax, and *Hancock* v. *General Reversionary and Investment Co.* (1) was relied on.

The Inspector of Taxes contended (inter alia): (1.) that the sum of 50,000*l.* was not an admissible deduction from the profits for the purposes of income tax and (2.) that the assessment was correctly made and should be confirmed.

The Commissioners found as facts: (i.) that the payments for the maintenance of their workpeople during invalidity constituted a continuous business demand in Rowntree & Co.'s business having regard to the manner in which that business was conducted; (ii.) that the primary object of the payment to trustees of the sum of 50,000*l.* in question was to establish a fund by setting aside a capital sum the income of which would be available to meet this demand; and (iii.) that the actual amounts to be paid away for invalidity had not been ascertained at the time when the payment was made, and were contingent and not capable of ascertainment. The Commissioners then stated: "In these circumstances we have to consider whether the decision in the case of *Hancock* v. *General Reversionary and Investment Co.* (1) covers the present case. In that case the liability had been ascertained, and by an actuarial calculation a capital sum was arrived at which the judge described as 'the pension in another form.' In the present case we are quite unable to say that the capital sum or any part of it is 'the invalidity liability in another form,' for that liability does not exist as an ascertained liability and the capital sum itself (as distinct from the income from it) is not primarily to be devoted to meeting it. Moreover we think it very doubtful whether in the present case the sum of 50,000*l.* can be truly said to have passed out of the control of the company, for no part of it can be expended as long as the business goes on except with the consent of the trustees who are the nominees of and removable by the company. For these reasons we consider that the sum of 50,000*l.* is a capital sum, and is employed in connection with the company's business in such a way that it must be deemed to be 'capital withdrawn from or . . . . sum employed in or intended to be

(1) [1919] 1 K. B. 25; 7 Tax Cas. 358, 371.

employed as capital' in the appellant's trade within the meaning of r. 3 (*f*) of the Rules applicable to Cases I. and II. of Sch. D, and we disallow the claim."

They amended the assessment however to 308,201*l.* less 21,626*l.* for wear and tear in accordance with the figures.

Upon appeal by the company Rowlatt J. held that the 50,000*l.* could not be treated as a payment by way of a fair business disbursement, and upheld the decision of the Commissioners.

The company appealed. The appeal was heard on February 18 and 19, 1924.

Latter K.C. and *J. H. Bowe* for the appellant company.
Sir Douglas Hogg K.C. and *R. P. Hills* for the respondent.

POLLOCK M.R. This is an appeal from a decision of Rowlatt J., who decided that upon the case stated which went before him, the claim made by Rowntree & Co. failed, and that the view held by the Commissioners must be affirmed.

Rowntree & Co. are the well-known firm of cocoa and chocolate makers. They have a very large business and they have a considerable number of employees. It appears that in a particular year—namely, 1919—their profits were sufficiently large to enable them to make provision for the invalidity of their workpeople. As found in the case, it appears that for some time they had been desirous of establishing a fund, the income of which might be used for the benefit of the employees of the company, both men and women, the alleviation of distress, invalidity, misfortune, etc. Therefore, from their profits of that year—1919—they set aside a sum of 50,000*l.* That sum was handed over to trustees to be held by them upon the trusts of a trust deed. The income of that sum, primarily, is to be used, but in certain unusual circumstances and subject to certain conditions and safeguards, the capital may be used to meet the claims of what is comprehensively called invalidity. The sum is a considerable sum, as the company is a very large one. Their profits

C. A. 1924

ROWNTREE & Co. v. CURTIS.

Pollock M.R.

are very fluctuating, but it so happens that in the year in question they had this sum, which they were minded, for the good of their employees, to set aside in this way to fulfil an aspiration which had been existing in the minds of the directors for some time past.

The question which arises for decision is whether or not they are entitled to deduct that sum of 50,000*l.*, set aside in that way, from the income of the company which falls to be charged to income tax for the year in question. The Commissioners, after finding the facts and applying the law to the case, came to the conclusion that this was not a deduction which could be made by the company in accordance with the Income Tax Act, 1918, and Rowlatt J. affirmed that decision, and so the matter comes before us.

Now it is wise to recall the rules which are applicable to such a case. First of all, the Income Tax Act, 1918, declares that the profit income of a person or a company is to be charged with income tax. When profits are made it does not matter what their destination is. That was decided in *Mersey Docks and Harbour Board* v. *Lucas* (1), and the same is to be found in the statement by Lord Dunedin in *Vallambrosa Rubber Co.* v. *Farmer* (2), where he says: "What are the profits and gains of the business? Now, it is quite true that in arriving at the profits or gains of a business you are not entitled, simply because—for what are likely quite prudent reasons—you either consolidate your business by not paying the profit away or enter into new speculations or increase your plant and so on—you are not entitled on that account to say that what was a profit is a profit no more. The most obvious illustration of that is a sum carried to a reserve fund. It would be a perfectly prudent thing to do, but none the less if that sum is carried to a reserve fund out of profit it is still profit, and on that income tax must be paid." So that once you have ascertained your profits the destination or the use to which you put your profits does not alter their character. The tax must still be paid on the total sum, even though prudent persons would make use of a part of those profits not by

(1) (1883) 8 App. Cas. 891. (2) (1910) 5 Tax Cas. 529, 535.

distributing it to their shareholders, but by putting it to a reserve fund.

The Income Tax Acts make it quite plain what deductions are to be allowed. The Income Tax Act, 1918, which is the relevant Act, by s. 209, sub-s. 1, provides that: "In arriving at the amount of profits or gains for the purpose of income tax—(*a*) no other deductions shall be made than such as are expressly enumerated in this Act," and when you go to the rules which are contained in Sch. D applicable to Cases I. and II. you find it is clearly laid down in r. 3, that "In computing the amount of profits or gains to be charged no sum shall be deducted in respect of (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation," or (cl. (*f*)) in respect of "any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation."

Now those are the rules that have to be applied, and having regard to the two cases that I have cited, which have been decided upon similar provisions of previous Income Tax Acts, it is clear that in order to justify a deduction being made from what I will call the gross profits, it must be shown—and I think the onus of doing so lies upon the subject—that what is sought to be deducted is money wholly and exclusively laid out or expended for the purposes of the trade—laid out, that is, for the purpose of earning the profits.

That being the rule, there are a number of cases which illustrate it. It is probably quite impossible to frame an accurate definition which would cover all cases, but you may find in the decided cases illustrations which afford an interpretation of the rule that I have stated as applied to the facts of business life. In the *Vallambrosa* case (1) it was determined that a deduction may be made in respect of something which is expended in one year if it is a proper business deduction for the purpose of earning profits, although it is an expenditure which covers and will affect not only the particular twelve

(1) 5 Tax Cas. 529.

C. A. 1924

ROWNTREE & Co. v. CURTIS.

Pollock M.R.

months of the income tax year, but also a series of years. So also in *Ounsworth* v. *Vickers, Ld.* (1), Rowlatt J. points out that supposing in a particular year the dredging was carried out as a necessary part of the business of the defendant company in that case, dredging which ought to have been done year by year—supposing you did in a single year what ought to have been spread over a series of years, still, as it was a necessary expenditure for the purpose of earning profits, that expenditure could be charged against the gross profits earned. There are many other indications which may be given to show that you are not to pay meticulous attention to what has happened in the particular period of charge. What you really have to attempt to ascertain is whether or not from the business point of view the expenditure has been wholly and exclusively laid out in the earning of the profits.

Then we come to another class of cases, in which an expenditure is made on business grounds of a sum, apparently a capital sum, but which really comprises and compresses what is an annual charge. Where you find that there is a continuous business demand, you may, on business principles, commute that continuous demand and on prudent grounds make a payment which covers more than the particular year, and you may be able to show that that sum has been spent in order to obviate the continuous business demand and, hence, that it is a sum wholly and exclusively laid out in the earning of the profits.

The case that perhaps illustrates that as well as any is *Hancock* v. *General Reversionary and Investment Co.* (2) In that case one Hancock, an employee of the company, was entitled to receive a sum by way of pension year by year, and the company came to the conclusion that instead of paying him that sum year by year it would be prudent from a business point of view to capitalize it and pay him an amount calculated actuarially as the true value of the interest which it had in meeting the continuous demand over a series of years against the profits and income of the company. Upon the facts found Lush J. determined that in paying down

(1) [1915] 3 K. B. 267. (2) [1919] 1 K. B. 25.

the actual actuarial value of the annuity to which Hancock was entitled, the company were doing no more than making a payment in order to save themselves the continuous demand which would otherwise fall upon them, and that therefore it was a sum wholly and exclusively laid out in the earning of profits, although no doubt the effect was to cover more than the period of charge under the Income Tax Act. I think that case must be treated as one which depends upon the actual facts found. It might have been possible to deal with it from a different point of view if the facts had not been definitely and clearly found as they were.

On the other hand, and taking an illustration on the other side, an attempt has sometimes been made to say that what is really a capital outlay ought to be treated on the same principle; and I will give an illustration of a claim which could not be allowed. Take the case of a company which has certain premises for which it has to pay rent. If it expends a certain amount of its capital in the purchase of the freehold of those premises, the expenditure is not an expenditure which can be deducted from its profits as having been wholly and exclusively laid out for the purpose of earning them, but is to be regarded as a capital charge, and the case falls on the other side of the line and the expenditure cannot be treated as a proper deduction. That again is illustrated by the decision in *Ounsworth* v. *Vickers, Ld.* (1), where it was held that the expenditure which the defendants had there made in securing a better channel and a better berth alongside their premises was a capital expenditure, and therefore that they were not entitled to deduct it from their gross profits in ascertaining their taxable profits.

I have indicated what is the rule under the Income Tax Act, 1918, and I have indicated, by the illustrations which I have given, the kind of cases which fall on the one side or the other. And now I come to the present case, which I confess I have found a difficult one and one as to which my mind has fluctuated very considerably during the course of the argument. The Commissioners have found—and it is

(1) [1915] 3 K. B. 267.

C. A. 1924

ROWNTREE & Co. v. CURTIS.

Pollock M.R.

for them to find the facts—that the payments for the maintenance of their workpeople during invalidity constitute a continuous business demand upon Rowntree & Co.'s business having regard to the manner in which that business is conducted. So far they have found therefore a fact which justifies Rowntree & Co. in dealing with this matter as prima facie a business demand upon them. Then they have found that the primary object of this payment of 50,000*l.* to trustees was to establish a fund by setting aside a capital sum, the income of which would be available to meet this demand; and perhaps some emphasis ought to be laid upon the fact that they believed that the income would be so available. I have pointed out that although in certain special circumstances an inroad could be made upon the capital, the original intention of the company was that the income alone should first of all be used to meet this continuous demand upon them. Then, thirdly, the Commissioners have found that the actual amounts to be paid away for invalidity had not been ascertained at the time when the payment was made and were contingent and not capable of ascertainment. That, I think, is a very important finding of fact which is binding upon us. It cannot be said that the matter could at that time have been dealt with actuarially or that it was a clear business proposition as to whether or not they would continue to pay the sums as and when demand was made upon them, or whether they would meet that ascertainable and ascertained demand by an immediate payment, as was done in *Hancock's* case. (1)

In *Hancock's* case (2) Lush J. said: "It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure as it would be to hold that, if an employer made a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay." In this particular case those attributes cannot be given to this particular payment. It is wholly uncertain

(1) [1919] 1 K. B. 25. (2) Ibid. 37.

what claims for invalidity would be made upon Rowntree & Co. No business proposition of the same nature as in *Hancock's* case (1) would be proposed to them by any insurance office, and the provision they have made may be wise or may not, but it is not a business proposition in the narrower sense that the proposition in *Hancock's* case (1) was. The Commissioners came to the conclusion in applying the law that it was impossible to say that this was invalidity insurance in another form, in the sense in which Lush J. had described the actuarial payment made in *Hancock's* case (1) as a pension in another form. I think it more closely approximates to the case of the purchase of a freehold in order no longer to have the demand for rent than it does to a prudent business payment in order to be rid of what was an ascertained demand likely to continue over a series of years.

Lord Parker in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2) states the principle as to deductions in this way : " The better view, however, appears to be that, where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed." Now it seems to me upon the findings of fact before us that it is impossible to determine that this deduction was proper and necessary to be made in order to ascertain the balance of profits and gains. It may prove to be good business ; the payment was certainly dictated by charitable motives and in the best interests of their employees, but whether or not it could be said to be proper and necessary is quite another question.

On the whole I have come to the conclusion that this payment does not satisfy the rules and cannot be said to be money wholly and exclusively laid out or expended for the purposes of the trade. I think, and it does Rowntree & Co. honour, that their motive was only in part business : it was also dictated by other and honourable motives. But we have to apply the standard laid down for us by the Income Tax Act, 1918, and we cannot enter into the motives or allow a deduction unless it comes within certain specific rules.

(1) [1919] 1 K. B. 25. (2) [1915] A. C. 433, 458.

C. A. 1924

ROWNTREE & Co. v. CURTIS.

Pollock M.R.

On this question of law, therefore, I am of opinion that the Commissioners have come to a right conclusion. But there is another aspect to which the Court ought to refer—namely, the findings of fact of the Commissioners. In their third finding the Commissioners meant to say that inasmuch as this continuous demand was not ascertained or ascertainable, it was very difficult to say that on business lines this money could be or ought to have been paid away for the purpose of seeking profits. In this connection there comes in the rule laid down in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (1), that it is on the border line a question of fact whether or not the money has been wholly or exclusively laid out or expended for the purposes of such trade. I think the Commissioners have found, and intended to find, as in *Smith's* case (1), that the necessary conditions were not fulfilled, and on this ground I should be prepared to hold that the case is concluded against the appellants.

But I do not put my judgment simply on the findings of fact. I put it on the question of law, and, having regard to the cases which have been decided, I have come to the conclusion that of the two alternatives, on which side of the line this case falls, this sum must be considered as a capital expenditure and cannot be treated as a necessary expenditure wholly or exclusively for the purpose of seeking profits, and therefore that the decision of Rowlatt J. is right and that the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The sole question at issue in the appeal is whether in computing for the year ending April 5, 1921, the amount of the profits of the business of Rowntree & Co. for income tax purposes a sum of 50,000*l.* should be deducted under the circumstances which have arisen.

I propose to state the facts and only those which appear to me to be material, and to state them quite shortly. Previously to 1920 Rowntree & Co., who have always done

(1) [1914] 3 K. B. 674.

apparently everything that could be done for the benefit of the persons employed by them, had two funds in existence, a Pensions Fund and a Widows' Benefit Fund, besides a Death Benefit Fund. To those Funds they had from time to time made payments of lump sums of money, and those payments had been habitually allowed as deductions for income tax purposes. In 1920, the company, having had an unusually prosperous year in 1919, determined to establish a fund to be applicable for the relief and assistance of such persons as "are in such a physical or mental condition, owing to ill-health, overstrain, or other similar cause, as to be totally or partially incapable of doing their ordinary work," and they proposed to call that fund the Invalidity Fund. In pursuance of that determination, on March 29, 1920, the company sent a cheque for 50,000*l.* to three persons whom they had selected to be trustees of the Invalidity Fund, and it is the amount represented by that cheque which is the expenditure in question. In the letter accompanying the cheque they said this: "At the meeting of directors, held on February 4, 1920, it was decided to set aside definitely the sum of 50,000*l.* in order that the income therefrom might be used for the benefit of employees of the company, both men and women, in the alleviation of distress, invalidity, misfortune, etc."

On June 7, 1921, a trust deed was prepared and executed by the company, which definitely settled the terms on which that sum of 50,000*l.* was held by the trustees, and the objects for which the fund was established. I propose to read but very little of that deed, but there are one or two provisions in it to which I think I must refer. In the definition clause (cl. 1) "The Fund" is defined to mean and include "the Invalidity Fund and all moneys investments property and income which may from time to time be or become subject to the trusts thereby declared of or concerning the Invalidity Fund." Then, after provisions relating to the trustees, their appointment, and their powers, and the powers of the committee who were to administer the grant, the deed contains this clause. [His Lordship then read clauses 4 and 5 of the

C. A. 1924

ROWNTREE & Co. v. CURTIS.

Warrington L.J.

trust deed, and continued :] It is the income of the Fund, including accumulated income, to which they are to have regard in arriving at the amount of the grant which they propose to make, and they are not, without the express sanction of the trustees, to make any grant which would entail the payment of a sum in excess of that income.

Then special provision is made in the succeeding clause to enable grants, if necessary, to be made out of the capital of the Fund. [His Lordship read cl. 6 of the deed.]

Now it seems to me that on the construction of that deed the intention of the company which founded the Trust was abundantly clear—namely, that the grants were to be made primarily out of income, but that if in any year the income available should not be sufficient, then, as a special case and under the special circumstances of that year, they were to be at liberty, if they obtained the express sanction of the trustees, to dip into capital to such an extent, and to such an extent only, as was necessary to meet those particular demands.

That then shows the mode in which the company carried out their determination to assist such of their employees as were subject to, to adopt the company's term, what I may call invalidity. The Commissioners before whom the question came found certain facts, and it is essential to consider those findings before determining whether in law they have come to a wrong or to a right decision. Now, the facts they find are these : "That payments for the maintenance of their workpeople during invalidity constitute a continuous business demand in Rowntree & Co.'s business, having regard to the manner in which that business is conducted ; (ii.) that the primary object of the payment to trustees of the sum of 50,000*l.* in question was to establish a Fund by setting aside a capital sum, the income of which would be available to meet this demand ; and (iii.) that the actual amounts to be paid away for invalidity had not been ascertained at the time when the payment was made, and were contingent and not capable of ascertainment."

It is not disputed, and in my opinion it cannot be disputed, that there was evidence sufficient to support all those findings

of fact, and, moreover, so far as the second of the two findings —namely, that which states that the primary object of the payment was to establish a fund—is a question of law on the construction of the trust deed, I think it is in accordance with the true construction of that deed.

In these circumstances the question is, is this expenditure of 50,000*l.* such an expenditure as may be allowed by way of deduction in ascertaining what are the net profits for the particular year in respect of which it was made? I need not go through the Act and rules. They have been read by my Lord and I need not read them again, but the question seems to me to be this: Is this expense money wholly and exclusively laid out or expended for the purpose of the trade, profession, employment or vocation? Now, if we had been dealing only with payments actually made in the year in question for the relief of invalidity, the first finding of the Commissioners would have justified that expenditure as one made exclusively for the purposes of the trade, profession, employment or vocation, and it is on that fact that, of course, the argument of the appellants is addressed to us. But in this case it seems to me that that fact does not conclude the question. The expenditure which has been made is not an expenditure of money merely for the purpose of meeting the demand in the particular year—that is quite plain—but it is intended to meet the expenditure for an indefinite number of years, an expenditure of an indefinite and incalculable amount. There are no actuarial principles by which the amount could be ascertained or computed. It is absolutely uncertain what amount the company will have to meet.

In these circumstances can it be said that this particular expenditure is money wholly and exclusively laid out or expended for the purposes of the trade? In my opinion it cannot. The amount of 50,000*l.* has no real relation to the expenditure, the nature of which would justify the payment. It has no real relation to the amount likely to be required for this purpose. What the company have really done is to create a permanent charitable fund applicable in the first instance, but not exclusively so, to the meeting of

C. A. 1924

ROWNTREE & Co. v. CURTIS.

Warrington L.J.

the claims of their workpeople in respect of invalidity, but applicable also in the circumstances specified in the deed to other charitable purposes.

It seems to me that it is impossible to say that a fund constituted under such trusts as those can be said to have been established by an expenditure which is wholly and exclusively for the purposes of the trade. I am inclined to agree with Mr. Latter in his contention that the money has actually been expended. There is nothing like a resulting trust in favour of the company, although there is that provision to which I have already called attention in the trust deed, that one of the things which might be done would be to abrogate altogether the trust or the provisions of the deed and to substitute other rules and provisions. But it seems to me that that cannot be said to be a resulting trust in favour of the company having regard to the other objects, which are pointed out as those to which the scheme was directed.

For this reason, that the expenditure cannot, in my opinion, be treated as wholly and exclusively for the purposes of the trade, I think the decision of the Special Commissioners and that of Rowlatt J. were correct and that the appeal ought to be dismissed.

EVE J. The question in this case is whether a sum of 50,000*l.*, transferred to the trustees in March, 1920, and thereby irrevocably dedicated to charitable purposes, was an expenditure necessary to earn the profits of 1919, in which alternative it might be exempt from tax as being money wholly laid out for the purposes of the appellants' trade, or was it, on the contrary, capital withdrawn from such trade, in which case it would not be deducted in computing the amount of the profits to be charged? I say in the first alternative it might be exempt, because it appears to me that the question would have to be determined, having regard to the particular charitable purposes for which the fund was dedicated.

It is not necessary for me to recapitulate any of the facts, but in the circumstances which have here been established and upon the authorities which have been relied upon on

either side, I think the relevant question may possibly be propounded in these words: Was this payment made as an instalment or in redemption of a recurrent business demand, or was it a setting aside or allocation of capital the income of which, when invested, was intended to be adequate in all probable contingencies to meet certain annually recurring demands of unknown amounts? The answer to that inquiry is, in my opinion, demonstrated not only by the finding of fact contained in sub-para. 2 of para. 12 of the case, but also in the scheme scheduled to the case and in the terms of the trust deed itself. This was a sum withdrawn from the business and invested for charitable purposes, including certain charitable purposes to which the company had been accustomed to make their annual contributions, from which the existence of this trust fund will in future years relieve the company. It is not a fund to be paid or employed once for all in the extinguishment of the annual contributions; it is constituted to provide by the income of the money, when invested, their continuance. The mere fact that the company has no continuing interest in the surplus income or in the capital does not alter the position, nor, in my opinion, would our conclusion have been different had the company constituted itself the trustee of this fund upon the trusts contained in the trust deed under which it is now held.

For these reasons I think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant company: *Radford & Frankland, for G. Barnard Black, York.*

Solicitor for respondent: *Solicitor for Inland Revenue.*

W. I. C.

C. A.
1924
Oct. 27:
Nov. 7.

[IN THE COURT OF APPEAL.]

PUDNEY *v.* WILLIAM FRANCE, FENWICK AND COMPANY, LIMITED.

SMITH *v.* LEACH AND COMPANY, LIMITED.

Workmen's Compensation — "Weekly Payments" — Discontinuance — Oral Agreement—Medical Examination of Workman by Employer's Medical Practitioner—Copy of Certificate of Medical Practitioner and Notice of Discontinuance of Payments sent to Workman—No Counter-certificate sent to Employer—Whether sending of such Certificate a Condition precedent to Arbitration Proceedings by Workman—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., paras.* 14, 15—*Workmen's Compensation Act*, 1923 (13 *& 14 Geo.* 5, *c.* 42), *s.* 14, *cl.* (*c*) *and proviso* (*i*).

By s. 14 of the Workmen's Compensation Act, 1923: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except in the following cases . . . . (*c*) where the medical practitioner who has examined the workman under paragraph (14.) of the First Schedule to the principal Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman: Provided that—(i.) in the last-mentioned case, if before the expiration of the said ten clear days the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the grounds of his opinion) disagreeing with the certificate so served by the employer, the weekly payment shall not be ended or diminished, except in accordance with such report, or if and so far as the employer disputes such report, except in accordance with the certificate given by a medical referee in pursuance of paragraph (15.) of the said schedule as amended by this Act; and . . . . (iii.) nothing in this section shall be construed as authorising an employer to end or diminish a weekly payment in any case in which, or to an extent to which, apart from this section, he would not be entitled to do so":—

Held, that the "weekly payments" referred to in the above section were not confined to weekly payments assessed under an award or recorded agreement, but included weekly payments made voluntarily or under an unrecorded agreement.

Dictum of Lord Loreburn in *Smith* v. *D. Davis & Sons, Ld.* [1915] A. C. 528, 532 followed.

Major v. *South Kirkby, Featherstone and Hemsworth Collieries, Ld.* [1913] 2 K. B. 145 distinguished.

Held, also, that where an employer, in accordance with the section, served upon the workman a copy of the certificate of a medical practitioner together with a notice of his intention to end the weekly payments, but the workman did not comply with the provisions of proviso (i.) to s. 14 of the Workmen's Compensation Act, 1923, by sending to the employer a report of a medical practitioner disagreeing with the certificate so served by the employer, the workman was not thereby precluded from subsequently proceeding to arbitration to assess the compensation payable to him.

APPEALS from the awards of the judges of the Mayor's and City of London Court and the Southwark County Court respectively sitting as arbitrators under the Workmen's Compensation Acts, 1906 to 1923.

The two appeals were heard consecutively.

PUDNEY *v.* WILLIAM FRANCE, FENWICK AND COMPANY, LIMITED.

In this case the applicant suffered an accident causing injury to his left knee on September 4, 1923. The respondents at once admitted liability, and without legal proceedings or any recorded agreement paid him compensation at the full rate, 35*s.* per week. On April 4, 1924, in accordance with para. 14 of Sch. I. of the Workmen's Compensation Act, 1906, the applicant submitted to examination at the instance of the respondents, and Dr. Oxley, who made the examination on their behalf, certified that the applicant had recovered and was fit for work. On the same date the respondents sent a copy of Dr. Oxley's report to the applicant, together with notice of their intention at the expiration of ten clear days from the date of the service of the notice to end their weekly payments to him. They thus complied with the terms of s. 14 (*c*) of the Workmen's Compensation Act, 1923, and on April 15 they stopped payment of the weekly compensation. The applicant took no steps to comply with the procedure provided in proviso (i.) of s. 14, but on May 23, 1924, commenced proceedings for arbitration in the Mayor's and City of London Court. On June 30, 1924, the case was heard, and on July 9 the learned judge gave his award and stated his reasons. He held that the procedure of the proviso above

C. A. 1924

PUDNEY v. WILLIAM FRANCE, FENWICK & Co.

SMITH v. LEACH & Co.

referred to was the procedure, and the only procedure, open to the applicant, and that as he had not complied with its terms, and had not sent to the respondents within the limit of ten days the report of a duly qualified medical practitioner disagreeing with the certificate served by his employer, he was precluded from taking proceedings to have the question of his right to compensation determined by arbitration, and dismissed the application with costs.

The applicant appealed. The appeal was heard on October 27, 1924.

Harold Morris K.C., *Martin O'Connor* and *F. N. Oldroyd* for the appellant.

A. Neilson K.C. and *G. C. Kingsbury* for the respondents.

Cur. adv. vult.

The arguments sufficiently appear from the judgments.

SMITH *v.* LEACH AND COMPANY, LIMITED.

In this case the applicant met with an accident arising out of and in the course of his employment with the respondents on January 31, 1923. The respondents admitted liability, and paid the applicant 35*s.* per week from the date of the accident down to November 14, 1923, when they reduced the amount to 20*s.* per week.

On March 1, 1924, the respondents gave the applicant notice, in accordance with s. 14 (*c*) of the Workmen's Compensation Act, 1923, of their intention to end his weekly payments after March 12, 1924, and sent with the notice a copy of the medical certificate of his recovery, as required by the section. The applicant did not avail himself of proviso (*c*) to s. 14 of the Act nor attempt to comply with its terms. On the expiration of their notice the respondents ended the weekly payments to the applicant.

On May 7, 1924, the applicant applied for an arbitration and claimed the sum of 1*l.* per week from March 12, 1924, from the respondents, and that the weekly payments of that sum should be continued. At the hearing before the county

court judge the respondents submitted as a preliminary objection that on the facts as above stated they were entitled under the provisions of s. 14 of the Act of 1923 to end the payments as they had done; that the applicant was not entitled to question their right to so end the payments by applying for an arbitration, and that it was not competent for the learned judge to question the respondents' right to end the payments conferred upon them by the Act, it being admitted or proved that they had complied with its provisions, and that the applicant had not done so.

The county court judge overruled the respondents' preliminary objection and made an award in favour of the applicant of 1*l.* per week from March 12, 1924.

The respondents appealed. The appeal was heard on October 27, 1924, immediately after the preceding case.

A. Neilson K.C. and *G. C. Kingsbury* for the appellant.

Martin O'Connor and *J. P. Rutherford* for the respondents.

Cur. adv. vult.

Nov. 7. The following written judgments were delivered:—

POLLOCK M.R. [after stating the facts in *Pudney's* case:] The question in this case is, what is the meaning and effect of s. 14 of the Act of 1923 upon the applicant's right to arbitration? The weekly payments made between September, 1923, and April, 1924, were not made under an award or recorded agreement. Does s. 14 apply to such payments? It is argued that weekly payments are in this section to be construed as they were in *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries, Ld.* (1) It is to be observed that the question directly raised and decided in that case was whether an employer could insist upon more than one examination, under para. 4 of Sch. I. of the Act of 1906, of a workman who had given notice of an accident and applied for an arbitration upon the question thereby raised. Lord Sumner (Hamilton L.J., as he then was) bases his judgment primarily upon the terms

(1) [1913] 2 K. B. 145.

C. A. 1924

PUDNEY v. WILLIAM FRANCE, FENWICK & CO.

SMITH v. LEACH & CO.

Pollock M.R.

of para. 4 of Sch. I., and the construction of that paragraph was the question that arose for the decision of the Court. It is true that all the members of the Court construed para. 14, which incidentally came into prominence by the contrast of its terms with para. 4, as referring only to weekly payments as to which the workman is in the position of a judgment creditor and the employer is in the position of a judgment debtor, but the decision does not derive its basis or force from this interpretation alone. Subsequently *Smith* v. *D. Davis & Sons, Ld.* (1), was decided by the House of Lords in 1915. In that case *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries, Ld.* (2), was cited. Lord Loreburn (3) in terms maintains that weekly payments in para. 14 of Sch. I. of the Act of 1906 include payments made by oral agreement, just as much as if they were payable under an award. Inasmuch as they were paid by the employer because of the latter's liability under the Act and not "as an act of mere charity or benevolence," his opinion was that what have been termed "voluntary payments" are, equally with those made under an award or recorded agreement, "weekly payments" within para. 14 of Sch. I. It does not appear to me that upon this state of the authorities this Court is compelled or ought to hold that s. 14 of the Act of 1923 does not refer to payments such as were made by the respondents in the present case to the applicant. On the other hand it is difficult to hold that the section applies to payments which there was no power to enforce. The use of the word "entitled" seems inapt, in relation to payments which still were voluntary in the sense that they had never been the subject of an award or recorded agreement. Proviso (iii.) at the close of the section creates difficulty. If it means what, ex facie, it says, that an employer is not to be held entitled to do what he cannot do without the provisions contained in the section, it appears to be otiose. If it has been added in order, by reflex action, to import some particular effect to the section, I confess that I do not understand what that effect is. By s. 11 of the Act of 1923 there is

(1) [1915] A. C. 528. (2) [1913] 2 K. B. 145.
(3) [1915] A. C. 528, 532, 533.

now power in the registrar to refer a matter to a medical referee under para. 15 of Sch. I. of the principal Act, on the application of one of the parties, as well as on the application of both parties, as had hitherto been the law, subject to an appeal to the judge and a discretion given to the registrar for sufficient reason to refuse the reference to a medical referee and to send the question to arbitration. Bearing this section in mind, and the correlative power of the employer, under s. 14, proviso (i.), without a time limit, to dispute the report obtained by the workman disagreeing with the certificate served by the employer, it does not seem possible to my mind to interpret the proviso as imposing an absolute time limit upon the action of the workman, which is to be a condition precedent to the workman's right to bring the matter to arbitration. That is the method which is affirmed in the main part of the section, subject only to the exceptions hereafter introduced. There is no statement in it that the procedure is in lieu of arbitration.

The learned judge felt the difficulty which his decision imposed upon the workman, who by inadvertence might lose his right to arbitration, and said that he could discover no provisions whereunder such defect could be cured. In the case of the time within which notice of the accident and notice of a claim is to be given under s. 2 of the Act of 1906, both matters of primary importance, no such irremediable limit is imposed. I cannot think that such a severe limitation of his rights can be imposed upon the workman by the action of the employer serving a notice under s. 14 (c). That clause introduces a procedure which, if followed, may lead to a decision by the referee conclusive as to the matters certified, but which, if not followed, does not effect a total withdrawal of the question from arbitration. The whole section is so obscure that I appreciate difficulties in any construction to be placed upon it, and can well understand a different view being held from that here expressed. However, it is not possible, or necessary in the present case, to determine the precise meaning and effect of the section in all its bearings; but I think the county court judge was wrong in holding the applicant

C. A. 1924

PUDNEY v. WILLIAM FRANCE, FENWICK & Co.

SMITH v. LEACH & Co.

Pollock M.R.

debarred from any other remedy by reason of the fact that he had not complied with the time limit of ten days. In this case, therefore, the appeal will be allowed with costs, and the award alternatively made by the county court judge in favour of the applicant for the amount claimed will stand good.

In the second case, that is *Smith* v. *Leach & Co., Ld.*, the material facts were the same : accident on January 31, 1923 ; an agreement on the part of the employers to pay compensation ; notice to the applicant on March 1, 1924, that their doctor had certified that the applicant had wholly recovered from the effects of the accident, and cessation of payments by the employers accordingly. The applicant sent no report within the ten days of a duly qualified medical practitioner disagreeing with the certificate so served by the respondents. The county court judge held that the applicant was not debarred by this failure from bringing the arbitration and made an award in his favour. In my judgment the county court judge was right, and the appeal must be dismissed with costs.

WARRINGTON L.J. The appeal in *Pudney's* case arises from the refusal of the county court judge to entertain a workman's request for arbitration as to the amount of compensation payable to him on the ground that he has not complied with s. 14 of the Workmen's Compensation Act, 1923. The learned judge has, in effect, held that in the cases to which they apply the provisions of the section provide an alternative to arbitration, and that unless they are complied with the latter proceeding cannot be resorted to.

The question turns wholly upon the construction and effect of this section, which is badly drawn and very difficult to understand. I propose first to consider its construction and effect without reference to authority, but bearing in mind that the Act in which it is contained is to be construed as one with the Workmen's Compensation Act, 1906 : see s. 31, sub-s. 2. It is unnecessary to read the section at length, but I shall have occasion in the course of this judgment to refer to the actual words of several parts of it. The proviso marked (iii.) enacts

that " nothing in this section shall be construed as authorising an employer to end or diminish a weekly payment in any case in which, or to an extent to which, apart from this section, he would not be entitled to do so." In what cases then, apart from the Act, was an employer entitled to end or diminish a weekly payment made by way of compensation under the Act of 1906? I can find no case in which he was entitled so to do, except that of a voluntary payment made by him without the sanction of either a recorded agreement or an award. He was not entitled to end or diminish a weekly payment made under such an agreement or an award; this could only be done as the result of a review of such weekly payment under para. 16 of Sch. I. to the Act. It seems to me, therefore, to follow that the words " a weekly payment under the principal Act " in this section must include, and I think it follows logically include only, a weekly payment made voluntarily without either of the sanctions above referred to. The present is such a case. The workman was injured on September 4, 1923. The employer admitted liability, and voluntarily paid the full compensation of 35s. a week until April 15, 1924, as from which date they purported to end it under the provisions of the section in question.

Apart from the Act an employer making a voluntary payment was entitled to end or diminish it summarily and of his own authority without taking any preliminary steps or giving any notice of his intention so to do, but with this result, that unless the workman chose to accept the position there immediately arose a question which the workman was entitled to have submitted to arbitration under the principal Act. The real question is whether, under the circumstances of this case, he has lost that right. The section in terms purports to restrict the right of the employer to end or diminish a weekly payment. The words are: " An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except in the following cases." In my opinion, having regard to the proviso (iii.) already referred to, the right of the employer in the excepted cases remains as it was prior to the

C. A. 1924

PUDNEY v. WILLIAM FRANCE, FENWICK & CO. SMITH v. LEACH & CO.

Warrington L.J.

Act—that is to say a right to end or diminish the payment with the result of giving rise to a question for arbitration. The excepted case marked (*c*) is thus described: "Where the medical practitioner who has examined the workman under paragraph (14.) of the First Schedule to the principal Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman." Para. 14 of Sch. I. to the principal Act is in the following terms: "Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." Now, apart from authority, I venture to think it is clear that if, as I think in this case, a voluntary payment is included in the expression "a weekly payment under the principal Act," the same construction, for the purposes of this section, must be given to para. 14 of Sch. I. to the principal Act, so as to render it incumbent on the workman to submit himself for examination by the medical practitioner there referred to, otherwise exception (*c*) would be inapplicable to the case of an employer making, and a workman receiving, a voluntary payment.

In the present case the workman submitted himself for examination by a duly qualified medical practitioner appointed and paid by the employers. The practitioner certified that the workman had wholly recovered, with the grounds of his opinion. A copy of the certificate, together with notice of the employers' intention to cease to pay compensation after April 15, 1924, was on April 5, 1924, duly served on the

workman, and the employers ceased after the date mentioned to make any further payments. Pausing here, unless there is something in the section to take away the workman's right under the principal Act, his claim to arbitration was complete. It is said that his right is lost by his failure to take the steps specified in proviso (i.), which I will now read. "In the last-mentioned case"—that is, the case described in (*c*)—"if before the expiration of the said ten clear days the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the grounds of his opinion) disagreeing with the certificate so served by the employer, the weekly payment shall not be ended or diminished, except in accordance with such report, or if and so far as the employer disputes such report, except in accordance with the certificate given by a medical referee in pursuance of paragraph (15.) of the said Schedule as amended by this Act." The words, "as amended by this Act," refer to the provision that the reference to the medical referee may now be made on the application of either workman or employer, and not of both, as it was in the original Act. It seems to me that the effect of this proviso is simply further to restrict the right of the employer to end or diminish the weekly payment under exception (*c*). If the workman fails to take the steps specified the further restriction does not take effect, the terms of exception (*c*) remain unaffected, the employer is entitled to end or diminish his weekly payment subject to the right of the workman to have the matter referred to arbitration.

It is said that proviso (ii.) substitutes an alternative procedure to that of arbitration and excludes the latter proceeding altogether. With all respect to the argument on this point, it does no such thing. If the workman takes the steps mentioned in proviso (i.) and the employer avails himself of the liberty to pay into Court given by proviso (ii.), then the dispute as to the disposition of the money so paid in, and incidentally I suppose as to the amount of any future weekly payment, may be determined by the registrar, or, on appeal, the judge, but there is nothing in the section to compel either party to do that which would give the registrar or the judge the necessary

C. A. 1924

PUDNEY v. WILLIAM FRANCE, FENWICK & CO.

SMITH v. LEACH & CO.

Warrington L.J.

jurisdiction. I am aware that unless in this section "a weekly payment under the principal Act" includes one made voluntarily, the basis of my reasoning disappears, and it is said that I am precluded by authority from arriving at the conclusion on this point expressed above. The case referred to is *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries, Ld.* (1) The point in that case, and the only point, decided was whether, where an employer having received notice of the accident voluntarily makes a weekly payment by way of compensation, can, after a considerable lapse of time, require the workman for a second time to submit to examination under para. 4 of Sch. I. This was decided in the affirmative. In the course of their judgments, however, all the judges, and particularly Buckley and Hamilton L.JJ., expressed the view that in para. 14 of the schedule, the expression "a weekly payment under this Act" does not include a purely voluntary payment. This may be so if para. 14 is taken by itself, but I have to interpret s. 14 of the Act of 1923 and para. 14 as read with it, and for reasons which I have given I think in s. 14 the expression in question must include a voluntary payment, and that para. 14 must be read in such a way as to make it accord with the section in which it is referred to.

I am of opinion, therefore, that the award of the county court judge must be set aside and the alternative award indicated by him as that which he would have made if he had taken a different view in point of law must be substituted for it.

In *Smith* v. *Leach & Co., Ld.*, the county court judge took the opposite view to that taken by the judge in the case I have been dealing with, and made an award in the workman's favour. The appeal in this case must be dismissed.

SCRUTTON L.J. These two cases raise points of some difficulty on the construction of s. 14 of the Workmen's Compensation Act, 1923. In each case the workman met with an accident, and the employers, without legal proceedings,

(1) [1913] 2 K. B. 145.

C. A.
1924
PUDNEY
v.
WILLIAM FRANCE, FENWICK & Co.
SMITH
v.
LEACH & Co.
Scrutton L.J.

or any recorded agreement, began paying him compensation, in *Pudney's* case full compensation; in *Leach's* case at first full compensation, admitting liability, then full compensation for partial disablement. In each case the employers thought that the workman had recovered and sent their medical practitioner, who certified that the workman had recovered. In each case a copy of the certificate was sent by the employers to the workman with ten days' notice of the employers' intention to end the compensation. In neither case did the workman send any certificate to the contrary effect, but in each case, after an interval, proceeded to arbitration to assess compensation due to him. In consequence no reference of the matters to a medical referee took place, but in each case, when the matters came before the county court judge, objection was taken on behalf of the employers that the workman, not having sent any counter-certificate as to his condition, was now precluded from disputing the certificate of the employers' doctor. The county court judge in *Pudney's* case decided that the employers' objection was good, in *Smith's* case that it was bad. In each case the county court judge found that in fact the workman had not recovered. The unsuccessful party in each case applies to this Court.

Before the Act of 1923 it was only possible to get to a medical referee direct by agreement of both parties under Sch. I., para. 15. The Act of 1923 by s. 11 provided that the registrar might send a question under para. 15 to a medical referee on the application of one party only, and this means was prescribed by s. 14 of the same Act as a way of settling the dispute where employer and workman produced contradictory medical certificates. The question in this appeal is whether this procedure of counter-certificates and reference to medical referee must be pursued if the workman desires to question the employer's certificate and the employer to question the counter-certificate; so that the workman is debarred unless he produces his counter-certificate and the employer unless he takes the difference on the certificate to a medical referee.

The first question seems to be to what cases does s. 14 of the

C. A. 1924

PUDNEY v. WILLIAM FRANCE, FENWICK & Co.

SMITH v. LEACH & Co.

Scrutton L.J.

Act of 1923 apply: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except in the following cases." Is "a weekly payment under the principal Act" confined to cases where the weekly payment has been assessed under an award or recorded agreement; or does it refer only to cases where the employer makes a voluntary payment as if he were liable under the Act, or does it cover both classes of payment? The phrase does not make its appearance in the Act of 1906 until Sch. I. begins to provide how the compensation to which the workman is entitled under the Act is to be assessed. From the lump sum payable there is to be deducted any "weekly payments made under this Act": para. 1 (*a*); "weekly payment during the incapacity": paras. 1 (*a*) (i.), (*b*); "In fixing the amount of the weekly payment": para. 3; "where a weekly payment is payable under this Act to a person under legal disability": para. 7. Para. 14 begins: "Any workman receiving weekly payments under this Act," and in this paragraph we have this amount of guidance. In *Major's* case (1) all three members of the Court of Appeal, who had not directly to decide any question under para. 14, took the view that the words only applied to those workmen who, either by recorded agreement or award, had got an established legal right to payment. Hamilton L.J. refers to the later words of the paragraph: "His right to such weekly payment shall be suspended," but in *Smith* v. *D. Davis & Sons, Ld.* (2), Lord Loreburn thought that there was no such restriction; the other Lords sitting expressed no opinion. Para. 16 runs: "Any weekly payment may be reviewed"—and here it would seem that the paragraph is referring to a weekly payment which has once been assessed and has now been reviewed by the Court which assessed it; but applications to review have been allowed where there has been only an unrecorded agreement: *Southhook Fire-Clay Co.* v. *Laughland* (3), though the employer is not entitled to suspend payment made under a recorded agreement before review has been ordered: *Wilsons*

(1) [1913] 2 K. B. 145. (2) [1915] A. C. 528, 533.
(3) 1908 S. C. 831.

and Clyde Coal Co. v. *Cairnduff.* (1) The proviso (ii.) in s. 14 of the Act of 1923 is probably intended to vary the last decision and to allow, in case of awards or recorded agreements, the employer to pay the disputed weekly payments into Court. Para. 17 allows the redemption by a lump sum payment of weekly payments which have been continued for not less than six months. Though this would seem likely to refer to established liabilities to weekly payment, in *Clawley* v. *Carlton Main Colliery Co.* (2) the House of Lords considered the question of redemption where there was no award or recorded agreement without this point being taken.

Mr. Morris for the workman argued boldly: (1.) that s. 14 of the Act of 1923 was confined to established legal liabilities, in which case the workman who had received payments without an award or recorded agreement was not within it; and, changing his ground completely; (2.) that it was confined to voluntary payments, as established liabilities could only be terminated by the Court on review. In support of the former view is: (1.) the fact that the medical practitioner is said to be acting under para. 14 of Sch. I., which the Court of Appeal in *Major's* case (3) has said is confined to legal liabilities already assessed; (2.) the argument that proviso (ii.) seems only applicable to assessed legal liabilities and out of place in voluntary payments not yet declared compulsory; (3.) the improbability that Parliament would think that a voluntary payment commenced without compulsion could not be discontinued. This position would make employers very chary of making any payments till their liability was assessed. In favour of the view that voluntary payments are referred to it is said that already an employer could not terminate an assessed liability without an order under review, and therefore the section was only necessary for payments by unrecorded agreement.

The question is a difficult one, but I am disposed to agree with Lord Loreburn's view in *Smith* v. *D. Davis & Sons, Ld.* (4), that "weekly payment under the principal Act" may extend to payments made voluntarily or under unrecorded

(1) 1911 S. C. 647.
(2) [1918] A. C. 744.
(3) [1913] 2 K. B. 145.
(4) [1915] A. C. 528, 532.

C. A. 1924

PUDNEY v. WILLIAM FRANCE, FENWICK & CO.

SMITH v. LEACH & CO.

Scrutton L.J.

agreement, but in discharge of liability to pay compensation under the principal Act. I further attach great importance to the change in the position of the medical practitioner who formerly could only be resorted to by agreement between the parties, but who, by s. 11 of the Act of 1923, might be imposed on one of them against his will. Reading s. 14 of the Act of 1923 from this standpoint, the employer shall not be entitled to end a weekly payment whether voluntary or compulsory "except in the following cases." This, I think, involves that he may end in the following cases: (1.) in pursuance of an agreement or arbitration, which latter covers a review. These words seem to me to be all-important in deciding this case, as the procedure under (*c*) can hardly be intended to exclude their operation. I pass over (*a*) and (*b*) and come to (*c*). He may end if his doctor certifies the workman recovered and ten days' notice is given to the workman, but (proviso (i.)) even in that case he may not end if the workman within ten days furnishes a contrary certificate, in which case the payment shall conform to the second report, unless the employer gets a certificate from the medical referee, having obtained an order from the registrar or judge under s. 11 of the Act of 1923 that the matter shall be referred to the medical referee. Now in the absence of an order obtained by the employer to go to the referee he is bound by the certificate of the workman's doctor, but I think may displace it by an agreement or arbitration under the earlier words of s. 14 of the Act of 1923. So in the same way I think the workman, if he does not furnish a certificate contradicting the certificate of the employer's doctor, is bound by it, but, again, he may displace it by agreement or arbitration under the first part of the section. I realize the clumsiness of a procedure which allows both part of a procedure under s. 14 (*c*) and a review under para. 16. I think Parliament had in mind an attempt to make more frequent the use of the medical referee; and I take the view that if the parties do go to the medical referee his certificate is conclusive. But I cannot find any express provision that if the workman does not send a counter-certificate he is deprived of recourse to an agreement or arbitration, in other words enabling the employer to force the

workman to resort to (c) instead of agreement or arbitration under the earlier part of the section, nor can I find an express provision that if the employer in the case of conflicting certificates does not go to the medical referee he is deprived of recourse to agreement or arbitration.

I take the view, for these reasons, that the decision in *Pudney's* case should be reversed and an award made in favour of the workman for the sum claimed, and that the decision in *Smith's* case should be affirmed. In each case the workman must have the costs of the appeal.

Great difficulty was caused by the obscure language of proviso (iii.) to s. 14. Read literally it says that the section is not to be construed as giving the employer any power to end which he had not before this section. This would be to make the section meaningless and cannot be the intention of Parliament. Another view presented was that "apart from this section" means "except as in this section provided," and the proviso means "the section shall not give greater powers than it does give"—an enactment which seems quite unnecessary. The obscurity of this section increases my doubt whether Parliament understood what they were doing or whether I have understood what they meant, but at any rate I cannot get any assistance from the proviso.

I have arrived at the above result with great difficulty, and can quite appreciate that other minds may arrive at several other and different conclusions, and I think it very regrettable that the Legislature both in this and the Rent Restrictions Acts has not taken greater pains to make its meaning clear.

Appeal allowed in Pudney's case and dismissed in Smith's case.

PUDNEY'S CASE:

Solicitors for appellant: *J. Nixon Watts & Co.*
Solicitors for respondents: *Botterell & Roche.*

SMITH'S CASE:

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondent: *J. Nixon Watts & Co.*

W. I. C.

1924
Nov. 24.

JOY *v.* EPPNER.

Landlord and Tenant—Rent Restrictions—Standard Rent—First Letting after August 3, 1914—*Apportionment—Increase of Rent, &c.* (*Restrictions*), *Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 3, 7.

The Rent Restrictions Act, 1920, s. 12, sub-s. 7, provides: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy, ... and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

In 1910 a newly built dwelling-house was let on a building lease for ninety-nine years at a ground rent of 8*l.* 10*s.* a year, which was less than two-thirds of the rateable value. There was no other letting until January, 1923, when the house was divided into two flats, and the upper flat let to a tenant at a rent of 2*l.* a week. The tenant applied for an apportionment under the Rent Restrictions Act, 1920, s. 12, sub-s. 3, and the county court fixed a hypothetical rent as the standard rent for the comprising property on August 3, 1914, and apportioned the standard rent for the flat at half that amount:—

Held, that having regard to s. 12, sub-s. 7 (supra), the lease of the comprising property in 1910 must be disregarded, and that the standard rent of the flat was the actual rent of 2*l.* a week, reserved under the tenancy of January, 1923, when the flat was first let separately as a "dwelling-house."

Appeal from Wandsworth County Court.

The appellant was the landlord of a leasehold dwelling-house known as No. 34, Madrid Road, Barnes, and the respondent was, and had been since January, 1923, the tenant of the upper floor thereof at a rent of 2*l.* per week. The upper floor was separated from the rest of the house by a partition, and according to the landlord the house had, since April, 1919, been reconstructed by way of conversion into two "separate and self-contained flats" within s. 12, sub-s. 9, of the Rent Restrictions Act, 1920.

By an indenture of lease dated April 27, 1910, in consideration of the expense incurred by the lessee in erecting the premises, they were demised to the lessee for a term of ninety-nine years as from March 25, 1905, at a peppercorn rent until September 29, 1906, and during the residue of the term were to be subject to a yearly rent of 8*l.* 10*s.* This was less than two-thirds of the rateable value of the house. The appellant

bought the premises in 1921 for 1030*l.* as a single house, and lived there himself. In January, 1923, he had the premises altered so as to constitute two flats, separated by a partition, and on January 15, 1923, the upper flat was let to the respondent as stated. A year later the respondent took out a summons in the Wandsworth County Court for an apportionment under s. 12, sub-s. 3, of the Rent Restrictions Act, 1920. The county court judge held that the lease of April 27, 1910, was evidence of a letting before August 3, 1914, and he estimated the standard rent as on August 3, 1914, at 82*l.* 10*s.* per annum for the upper portion of the premises. He also held that there was no evidence of a reconstruction of the premises.

The landlord appealed on the grounds (1.) that the premises were not subject to the Rent Restrictions Acts because they had been converted into two separate and self-contained flats after April 2, 1919; (2.) that the lease of April 27, 1910, did not constitute a letting of the whole premises, and that they were not let prior to August, 1914; and (3.) that there was evidence of a reconstruction of the premises within s. 12, sub-s. 9, of the Rent Restrictions Act, 1920.

The material sections of the Rent Restrictions Act, 1920, are set out below. (1)

Merriman K.C. and *J. H. Watts* for the appellant. The county court judge had no power to make this apportionment. He realized that he could not apportion the peppercorn rent or even the 8*l.* 10*s.* rent, but he has built up a notional rent,

(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, provides:—

Sub-s. 1 (*a*): "The expression 'standard rent' means the rent at which the dwelling-house was let on August 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said August 3, the rent at which it was first let."

Sub-s. 3: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on

1924

JOY v. EPPNER.

and has apportioned that. The Act of 1920 does not apply to this tenancy at all, for by s. 12, sub-s. 7, it is not to apply to a tenancy where the rent payable in respect thereof is less than two-thirds of the rateable value, as it is here. The 8*l.* 10*s.* is the only rent at which the whole house has ever been let, and by virtue of sub-s. 7 there is no standard rent for the whole house. The standard rent for the part occupied by the respondent is 2*l.*, being the rent at which it was first let after August 3, 1914, within the meaning of s. 12, sub-s. 1 (*a*). No doubt it is true that if the pre-war rent of the whole house had been higher than the limits fixed by s. 12, sub-s. 2, so that the Act did not apply, that rent could still be apportioned.

The Act does not apply, because since April 2, 1919, this house has been bona fide reconstructed by way of conversion into two separate and self-contained flats within the meaning of s. 12, sub-s. 9.

[*Smith* v. *Prime* (1) and *Sutton* v. *Begley* (2) were referred to.]

Gilbert Stone for the respondent. The question of reconstruction is one of fact, and there was evidence on which the judge could find as he did. The whole house has not been reconstructed, but the respondent's part only.

[He referred to *Darrall* v. *Whitaker* (3); *Marchbank* v. *Campbell* (4); and *Woodhead* v. *Putnam*. (5)

As to the right to apportionment, the Act of 1920, s. 12, sub-s. 3, speaks of apportioning the "rent," not the "rack rent," and a house is deemed to be let for the purposes of the Act, even though there is only a peppercorn rent: *Jenkinson* v. *Wright*. (6) It is only taken out of the Act if s. 12, sub-s. 7, applies.

[SALTER J. If the house were not a dwelling-house, s. 12, sub-s. 7, would not apply. The accident that the "comprising" property is a dwelling-house makes all the difference.]

application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

Sub-s. 7: see headnote.

(1) [1923] W. N. 131.
(2) [1923] 2 K. B. 694, 699.
(3) [1923] W. N. 165; 39 Times L. R. 447.
(4) [1923] 1 K. B. 245.
(5) [1923] 1 K. B. 252.
(6) [1924] 2 K. B. 645.

Yes. The word "property" is used in s. 12, sub-s. 3, to distinguish it from dwelling-house, as used elsewhere in the Act. Here it is necessary to apportion, because the part has not been previously let. Sect. 12, sub-s. 7, has no application. The part here as to which apportionment is asked is within the Act. The rent is not such as to take it outside the Act, and therefore there must be a standard rent. In order to find the standard rent, it is not necessary that there should have been a previous letting. The lease of April 27, 1910, was clearly a letting, and therefore s. 12, sub-s. 3, applies; the question of the quantum of the standard rent found by the judge is not open to appeal.

Merriman K.C. in reply. If the standard rent or rateable value of the "comprising premises" cannot be found, then the rent as at the first letting of the part which forms the new "dwelling-house" must be considered, and that constitutes the standard rent, so that it is not necessary to resort to apportionment. Had the premises been a factory and a dwelling-house been carved out of it, the first letting of the dwelling-house would have to be considered. The test in the case of the factory would not be the same as in the case of a dwelling-house. Sect. 12, sub-s. 7, of the Act of 1920 applies, and *Veale* v. *Cabezas* (1) is an authority in favour of the appellant.

SHEARMAN J. This is an appeal from the Wandsworth County Court on a summons for an apportionment under the Rent Restrictions Act, 1920. The facts are that the appellant, the landlord, had let the upper portion of his house to the respondent tenant at 2*l.* a week. Having gone into possession, the tenant took out a summons for apportionment, with the object of getting the rent which he had agreed to pay reduced under the provisions of the Act. The county court judge entered upon an inquiry as to how the house had been let originally, and as to what would have been the rent in the year 1914 which a hypothetical tenant would have paid for it. He made a hypothetical rent for the whole premises,

(1) [1921] W. N. 311.

1924

JOY v. EPPNER.

Shearman J.

and fixed the standard rent of the new premises as half the hypothetical rent. An appeal is brought to this Court alleging that there was no jurisdiction under the Act for the county court judge to make any such apportionment at all, and, in my judgment, that is correct and the appeal succeeds.

The history of the property is this. From the year 1905 this house had been let upon a building lease at a peppercorn rent, increasing ultimately to 8*l.* 10*s.* as ground rent. The owner of the house lived in it, and in 1921 the present landlord (the appellant) bought it for 1030*l.* as a single house and lived in it himself. Finally, in January, 1923, he did some structural alterations, by which it was divided into two self-contained flats, and let the upper one at 2*l.* a week. The tenant, having gone in, desired to have his rent reduced by obtaining an apportionment. The argument on behalf of the tenant was that he was entitled to look into the value of this house, and as it was not disputed that the upper part of the premises were about one-half of the whole, he says that he should pay just half the rent which a tenant would have paid in 1914. The argument of the landlord is that though there are, on the decisions, the widest powers of fixing what the Irish used to call a "fair" rent on apportionment, this is a case which is not touched by the Act, and there can be no apportionment. The law as to apportionment was finally settled by the case of *Sutton* v. *Begley*. (1) In that case a house had been let at a rent which was outside the restrictions of the Act. It had then been subdivided and part sublet in June, 1921, at 80*l.* a year. It was held that, notwithstanding the fact that the original property was outside the Act, yet if it was cut up into portions and sublet you could look at the total rack rent at the time the Act came into force, and apportion the proper rent having regard to the rack rent of the whole. It was argued on behalf of the tenant in this case that when there is no actual rack rent you can fix it by having a general inquiry as to value. In my judgment, that contention is not correct. The case depends upon s. 12 of the Act of 1920, sub-s. 1 (*a*), sub-s. 3, and sub-s. 7. Sect. 12, sub-s. 1 (*a*), says:

(1) [1923] 2 K. B. 694.

"The expression 'standard rent' means the rent at which the dwelling-house was let on the third day of August nineteen hundred and fourteen, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let: Provided that, in the case of any dwelling-house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent; and where at the date by reference to which the standard rent is calculated, the rent was less than the rateable value the rateable value at that date shall be the standard rent." Sub-s. 7 says: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply"—that is dealing with these ground rents or peppercorn rents—"to that rent or tenancy." Those words are very strong, and where there was a rent or a letting such as is described in the present case, "this Act shall apply as if no such tenancy existed or ever had existed." It is noticeable that the word "tenancy" is used there. When one comes to sub-s. 3, which is the section under which this application for apportionment of rent was made, it is as follows: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies"—and it is not the whole house, but the upper half of the premises which we are now considering as a dwelling-house—"it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the Court as to the amount to be apportioned to the dwelling-house shall be final and conclusive." It is suggested that that gives the county court judge an absolute right to look into all the circumstances and fix a fair rent. I am unable so to read the section. In determining the standard rent on this application (that is the

1924

JOY v. EPPNER.

Shearman J.

standard rent of the upper portion of the premises) it seems clear to me that for the section to apply at all it is necessary to apportion the rent in relation to which that standard rent is to be fixed, that is, the rent which Salter J. aptly described during the argument as the rent of the "comprising property." There is only jurisdiction to deal with this when you find a rent of a complete comprising property. When one looks at s. 12, sub-s. 7, in the circumstances of this case, there never was a rent at all or a letting of the comprising property so as to come under any of the provisions of the Act. The result is that it was not necessary to apportion, and the county court judge could not do it, for there was no previous letting at all of the comprising property which he was entitled to consider. It seems to follow, as regards this upper portion of the premises, that the first letting which the applicant before the county court judge had was a letting at 2*l.* a week, and that, in my judgment, is the standard rent of the property. On these grounds it seems to me the objection was properly taken, the county court judge had no right to apportion, and this appeal must be allowed.

There was another point in this case. Under s. 12, sub-s. 9, it was said that this house had been bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. It seems to me that some little work was done, but it was hardly argued that two self-contained flats were not created, and there was no suggestion that it was not done bona fide. Nevertheless the county court judge states that he was not satisfied that there had been reconstruction, and as that is a question of fact, this Court has no jurisdiction to deal with it. On that ground we should have been unable to assist the appellant, but on the other ground and for the reasons given I am of opinion that this appeal should be allowed.

SALTER J. I am of the same opinion. This is a novel and difficult point. As regards s. 12, sub-s. 9, I have nothing to add. As to the rest of the case, I am sure that the decision of the county court judge is wrong, but I am not so clear as

to the proper standard rent of the applicant's dwelling-house. The applicant comes to the county court judge to have the standard rent of his dwelling-house fixed, and invites the judge to fix it by means of apportionment of the rent of the property in which his dwelling-house is comprised. His dwelling-house is the upper part, and in this case the comprising property is the whole house. He is entitled to have the standard rent of his dwelling-house fixed, and to have it fixed by apportionment if he can show that apportionment is necessary. Reference must therefore be made first to s. 12, sub-s. 1 (*a*), which gives the general rule for ascertaining standard rents, and provides in effect that you are to look first at the actual rent of the dwelling-house—that is, of the upper part of the premises, which is the applicant's dwelling-house in this case—as on August 3, 1914. If the dwelling-house was in fact let on that date, then the rent at which it was then let is the standard rent. No further inquiry is possible, and if at that date it was let not separately, but as part of the whole, its standard rent must be ascertained by apportionment of the whole. If, and only if, the dwelling-house was not in fact let on that date, then you have next to look and see what was the rent at which it was last let before that date, and if you fail again to find any letting before that date, then you have to look and see in the case of a dwelling-house which was first let after August 3, 1914, the rent at which it was first let. The rent to look at is the rent on August 3, 1914; if not, the rent next before; and if not that, the rent next after. Now here there was the suggestion, quite apart from s. 12, sub-s. 9, that there had been such substantial structural alterations that it was necessary for the judge to say that this particular part was first let when it was first let separately on January 15, 1923. The learned judge declined so to hold, and I think the evidence warranted him in so finding. Therefore I return to s. 12, sub-s. 1 (*a*). He had to ask himself: Was this upper part in fact let as part of a whole on August 3, 1914? The answer to that question in fact is "yes"; the document was before him in evidence. There was in force at that date

1924

JOY v. EPPNER.

Salter J.

a lease of the property in which this dwelling-house was comprised at a ground rent of 8*l.* 10*s.* a year. Therefore this upper part was then let, and presumably, therefore, the standard rent must be ascertained by apportionment of the actual rent of the comprising property at that date. That brings us to sub-s. 7, and it is argued that in consequence of the provision of that sub-section it was the duty of the judge to ignore that lease dated April 27, 1910, which was the lease of the whole at a ground rent for ninety-nine years from 1905. The words of the sub-section are very strong: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy"—I am reading the material words only—"and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

Now the question is whether that sub-section applies to apportionment; whether it applies not only to dwelling-houses which are the subject of tenancy within the Act, but applies also to these cases where the comprising property under s. 12, sub-s. 3, happens to be a dwelling-house. The comprising property, of course, need not be a dwelling-house; it need not be a structure at all. I am inclined to think it might be an interest in chattels. The argument is that it so happens that the comprising property is a dwelling-house and then sub-s. 7 applies. I entertain grave doubt whether it was intended that sub-s. 7 should be applied to a comprising property under sub-s. 3, but the words of the section are so plain and so emphatic that I feel constrained to read the sub-section in its full natural meaning, and inasmuch as the comprising property is in fact a dwelling-house I think that sub-s. 7 must be applied. The strange result is that whereas here the standard rent of this upper part is 2*l.* a week, if the comprising property had happened not to be a dwelling-house, then the standard rent would have been about 4*l.* a year. Assuming, therefore, that sub-s. 7 does apply, the learned judge was bound to disregard that document. He then had to ask himself whether this upper part was let as part

of the whole before August 3, 1914, and he had no evidence of any such letting except this document, which he must disregard. Lastly, he had to ask himself, whether this upper part had been let as part of a whole at any time after August 3, 1914. Again he found no evidence of any letting. The result is that there is before him no evidence at all of any letting before, and the only letting after is the separate letting of this property on January 15, 1923. The standard rent therefore is the actual rent. The learned judge appears to have thought that as he was bound to disregard the letting at a ground rent shown by this lease he must construct an imaginary rack rent as at August 3, 1914; and he did so, and based the standard rent upon such imaginary rack rent. But this Act deals with real lettings and real rents and with real rates fixed by authority, not with imaginary rents or lettings. Whatever the correct decision of this case may be, I am quite sure that is the fact, and I agree with my Lord, therefore, that this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *H. T. Nicholson.*
Solicitors for respondent: *Tatton, Gaskell & Co.*

F. P. F.

C. A.
1924
Nov. 21.

[IN THE COURT OF APPEAL.]

HARTLAND *v.* DIGGINES (Inspector of Taxes).

Revenue—Income Tax—Voluntary Payment of Salary without Deduction of Income Tax—Basis of Assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E.*

A shipping company voluntarily paid the income tax on the salary of their accountant:—

Held, that the amount of this payment must be added to the salary of the accountant in order to ascertain his income for income tax purposes.

Decision of Rowlatt J. [1924] 2 K. B. 168 affirmed.

Appeal from the decision of Rowlatt J. (1) on a case stated under s. 59 of the Taxes Management Act, 1880, by the Commissioners of Income Tax on Public Offices or Employments of Profit in the City of London.

At a meeting of the above Commissioners held on June 13, 1921, the appellant, Harry Hartland, of 138 Leadenhall Street, appealed against an assessment to income tax made upon him under Sch. E for the year ending April 5, 1919. The appellant was throughout the year of assessment in the employ as their accountant of the New Zealand Shipping Co., Ld. (hereinafter called "the company"). The assessment appealed against included, in addition to the appellant's salary of 500*l.*, a further sum of 80*l.* 5*s.*, arrived at in the following way. It had been the custom of the company since 1912 to pay every year the income tax in respect of the salaries of all its employees, including the appellant, and for the year of assessment the amount so paid was included in the working accounts of the company under the heading "Income Tax: staff," and had been allowed as a trade expense and deducted in arriving at the profits of the company for the year of assessment. The sum of 80*l.* 5s. was the sum so paid by the company in respect of the salary of the appellant. The company entered into no agreement, either verbally or in writing, with the appellant as to the payment

(1) [1924] 2 K. B. 168.

of income tax, but the company had in fact paid the income tax in respect of the appellant's salary since 1912.

It was argued for the appellant that the payment was not a money payment or a payment convertible into money, and formed no part of his salary or income and was therefore not assessable under the Rules applicable to Sch. E.

For the respondent it was contended that the income tax paid by the company was paid on behalf of the appellant in respect of the appellant's salary and was income of the appellant, even if the payment was voluntary, and that it was income that came to him by virtue of his office.

The Commissioners confirmed the assessment, but stated this case.

There was no question of figures, the only question for the Court being whether, in arriving at the assessment appealed against, there had been rightly included the sum of 80*l.* 5*s.* above referred to.

Rowlatt J. answered the question in the affirmative.

The appellant appealed. The appeal was heard on November 21, 1924.

Edwardes Jones (*Latter K.C.* with him) for the appellant repeated the arguments used by him in the Court below.

Sir Henry Slesser K.C. and *R. P. Hills* for the respondent were not called upon to argue.

POLLOCK M.R. This is an appeal from a decision of Rowlatt J. given upon March 27 of this year, and the question which has to be decided upon the case is a point which in one shape or another has been before the Courts not unfrequently in the last few years. It appears that the appellant, Harry Hartland, is employed as the accountant of the New Zealand Shipping Co., Ld., who have an office in the City of London, and he receives a salary from the company of 500*l.* a year. It also appears, from what we have been told, that in one year, if not in more, the company were able to give, and did give, a bonus to their employees. I do not do more than mention it, because it may be a source

C. A. 1924

HARTLAND v. DIGGINES.

Pollock M.R.

from which a correction may be given to the figures which are before us. But the company, for the purpose of assisting their staff, and, indeed, of increasing their salaries, have since 1912 adopted the custom of paying the income tax in respect of their salaries, including that of the appellant; and when the company have so paid the income tax in respect of the salaries of their employees they have sought and been allowed to deduct from their income tax returns the sums which they have so paid, and have entered them in their working accounts under the heading: "Income Tax: staff."

The effect has been that the company have been allowed a deduction in respect of the increases of salary paid to their staff, measured by the amount of income tax for which their staff would have been liable; and the question is whether or not a member of the staff, Mr. Hartland, is to be treated as having received and being liable in respect of not merely the actual salary, or salary plus bonus that he has received, but, in addition to salary and bonus, the amount of the income tax which has been paid to the Income Tax Commissioners on his behalf in respect of that for which he was liable.

It is said by Mr. Edwardes Jones—who, in the absence of his leader, has put the matter fully before us and dealt with all the cases—that so far as Mr. Hartland was concerned, the sum paid to the Income Tax Commissioners in respect of the salary which he earns is a sum voluntarily paid by the company and is no concern really of his, and does not fall to be taxed as part of his salary, or fall within any of the words which impose and charge liability upon him.

It appears that Mr. Hartland is charged under Sch. E; that is the schedule which deals with holders of offices. The description of "offices" is contained in r. 6 of Sch. E, and includes (cl. *h*) "offices or employments of profit under any company or society, whether corporate or not corporate." Prima facie, therefore, it was right to assess Mr. Hartland under Sch. E, because he was an accountant to a limited company—the New Zealand Shipping Co., Ld. Under Sch. E, the persons who are charged by it are required to pay taxes in respect of salaries, fees, wages, perquisites or profits

whatsoever accruing by reason of such office; and the word "perquisites," if it is necessary to amplify it, by r. 4 (3.) shall be "deemed to be such profits as arise in the course of exercising an office or employment from fees or other emoluments."

It is said by the Crown, therefore, that Mr. Hartland is liable to be assessed in respect not only of his salary or profits whatsoever, but also of perquisites and profits that arise from fees and other emoluments. It seems to me that the words are so wide that they include the sum which is in question in the present case—namely, the sum which has been paid by the company to the Revenue authorities to discharge Mr. Hartland's liability to income tax.

It has been claimed by the Revenue authorities in a number of cases that the sum which is used to discharge the liability to income tax ought to be added to the salary received by the person on whom the duty is charged, in order to ascertain what his actual earnings, or wages, or receipts have been in any particular year. It has been put that he has received x, the amount of salary, and y, the measure of immunity from income tax, which he has been spared from paying because it has been paid by his master, or from some other source. But taking those two symbols, what he has in fact received is $x + y$.

Now, the matter came up for discussion in *Attorney-General* v. *Ashton Gas Co.* (1) The point that there arose was whether a gas company, which was prevented by its special Act from dividing a larger dividend than that fixed by the Act, could pay the full dividend allowed by the Act and at the same time pay in addition the income tax payable upon that dividend. It was held that in calculating the rate of dividend, the income tax payable in respect of the sum divided ought to be included. Buckley J. put it in this way, that if the payment is made direct from the company to the Revenue, in respect of the sum paid as dividend, a shareholder gets more than a 10 per cent. dividend. He said (2): "In other words, he (the shareholder) receives 10 per cent.,

(1) [1904] 2 Ch. 621. (2) [1904] 2 Ch. 621, 623.

C. A. 1924

HARTLAND v. DIGGINES.

Pollock M.R.

and an indemnity against a liability to pay part of it to the Revenue, or allow a deduction by the company of such part as the company has paid to the Revenue for income tax." The reasoning of Buckley J.—and his actual words were approved by Cozens-Hardy and Romer L.JJ.—was that the immunity is to be treated as in the nature of a receipt, or deemed to be a receipt by the shareholder.

The matter was afterwards discussed in a number of other cases, and in *Samuel* v. *Inland Revenue Commissioners* (1) it was determined that, where certain dividends were paid "tax free," in order to ascertain the amount received by the shareholder, there must be added to the amount of the actual dividend the amount of the income tax paid by the company in respect of that dividend, and that the sum received by the shareholder was the sum total of those two amounts.

Mr. Edwardes Jones puts his case in this way: that it may be that where a person actually receives something paid over to him, that amount ought to be added to his salary; or if the relation between the person who pays direct to the Revenue and the person on whose behalf it is paid is such that there is a contract between them, it may be that the sum paid is to be treated as between the two parties who stand in the relation of employer and employed, or company and shareholder, and the like, as a receipt by the employee, or by the shareholder, because the payment is made by some person with whom there was some contractual, statutory, or other right, which would justify the person who pays direct, in so doing as against the person for whom he pays. But he argues that in the present case Mr. Hartland did not receive any money, and the company were not entitled to pay the money. If they like to make a voluntary payment, well and good, they may do so; but as between the company employing him and himself, the company were not entitled to make any payment.

Now, how far the question of the right to pay, or the right to demand the sum paid (if not paid direct to the Revenue) goes, has been discussed in a number of cases. A subject may be

(1) [1918] 2 K. B. 553.

made liable and charged to income tax in respect of contributions which are paid over to him, although not on any legal basis. Thus in *Blakiston* v. *Cooper* (1) it was held that voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use are assessable to income tax as " profits accruing to him by reason of his office " under Sch. E. It does not, therefore, finally determine the point to say that the money which was paid on behalf of Mr. Hartland was a freewill offering on the part of the company for him. He may still be responsible to the Revenue in respect of that.

There are other cases which deal with voluntary sums paid to a person virtute officii. *Herbert* v. *McQuade* (2) is another illustration. There, grants of money were made by a diocesan branch affiliated to the Queen Victoria Clergy Sustentation Fund to the incumbent of a benefice, and it was held that the grants received were " perquisites or profits accruing by reason of his office " within r. 1 contained in s. 146 of the Income Tax Act, 1842, for charging duties under Sch. E.

The voluntary nature of the payment, therefore, does not, to my mind, determine the question that is before us, and no strong argument can in my opinion be made to differentiate the voluntary nature of the payment made, having regard to the two cases to which I have referred of *Blakiston* v. *Cooper* (1) and *Herbert* v. *McQuade.* (2)

But it is said by Mr. Edwardes Jones that the company, if they wanted to deduct, or if Mr. Hartland is to be charged with the increased sum paid to the Revenue, must have made that payment under some contract to which he was a party. After carefully looking at *North British Ry. Co.* v. *Scott* (3) I am of opinion that that contention is not sound. In *North British Ry. Co.* v. *Scott* (3), the railway company had been assessed to income tax in respect of the offices and employments held under the company. They had agreed with their officers not to exact from them severally the sum

(1) [1909] A. C. 104. (2) [1902] 2 K. B. 631.
(3) [1923] A. C. 37.

C. A. 1924

HARTLAND v. DIGGINES.

Pollock M.R.

which they had had to pay to the Revenue in respect of those salaries. The Income Tax authorities claimed that the fact that the sums paid by the railway company were not deducted from the salary, in effect increased the salaries of the officers of the railway company, and hence the salaries received by them must be deemed to be not only the actual salaries paid into their hands, but also the sum paid on their behalf to the Revenue. The House of Lords held that that contention was correct.

Mr. Edwardes Jones answers that case at the outset by saying that in the particular case of a railway company there is a provision in s. 6 of the Income Tax Act, 1860, which makes the railway company the hand or source to pay to the Revenue the tax upon the salaries of the officers employed by the railway company. I think the section goes further and imposes the liability upon the railway company. The words are: "the said assessment shall be deemed to be and shall be an assessment upon the company, and paid, collected, and levied accordingly." No doubt the Revenue were glad to have the system under which they could collect en bloc from the railway company the total sum which would have been charged upon the employees of the railway individually. But s. 6 imposes upon the railway company the actual liability to pay the sum, and in the latter portion of s. 6 it is provided: "that it shall be lawful for the company . . . . to deduct and retain out of the fees, emoluments, or salary of each such officer or person the duty so charged in respect of his profits and gains." In the case as argued before the Court of Session (1) Lord Mackenzie points out that that which goes to the Inland Revenue is money or money's worth. I think it is quite clear that the noble Lords who took part in the decision in the House of Lords in *North British Ry. Co.* v. *Scott* (2) did not intend to make any distinction such as is suggested by Mr. Edwardes Jones, that the position of the employee was in any way altered, whether or not the sum was paid on his behalf by a contract with his employer, or under statute, as in the case of a railway

(1) (1922) 8 Tax Cas. 332, 336. (2) [1923] A. C. 37.

company, or merely voluntarily, as it is said it was paid in this case.

Lord Dunedin, in dealing with the matter, says (1): "Most of the appellants' argument was rested on the fact that this was a company debt and not the official's debt; and it was contended that the company could not be asked to pay an assessment on an assessment. The fallacy of this argument consists in ignoring the fact that, though this is a company debt, the measure of that debt is not any liability of the company, but is what would be the liability of the official under Sch. E if that liability were not transferred to the company by the section."

But when Lord Atkinson came to deal with the matter he put it in this way (2): "Whether the company avails itself or not of the means provided by statute to enable it to recoup itself for its outlay in paying the debts of its officers is its own concern. Its action in that respect cannot, in my view, affect prejudicially the rights of the revenue." There are other passages in the judgment to which I have referred amplifying that view.

We come, therefore, back to this position, that Mr. Hartland is responsible to the Revenue for the payment of the tax in respect of his emoluments and salary and perquisites which he receives; and in effect what he has received is, as stated in *Attorney-General* v. *Ashton Gas Co.* (3) and in other cases, a certain amount of money into his hands, and an indemnity against a liability to pay any part of it to the Revenue. In effect, therefore, what he has received is money paid into his hands, plus that immunity; and, as Lord Atkinson puts it, one has to look at the substance of the matter; it cannot be said that by any arrangement, or even by any want of arrangement, the position of the Revenue can be prejudicially affected. The substance of the matter is that the salary paid to Mr. Hartland is not all he has received. He has received money's worth to the extent of the sum which has been paid in respect of that salary to the Revenue.

(1) [1923] A. C 37, 41. (2) Ibid. 45.
(3) [1904] 2 Ch. 621.

C. A. 1924

HARTLAND v. DIGGINES.

Pollock M.R.

I come, therefore, to the conclusion that the decision of Rowlatt J. was right, and the appeal must be dismissed.

I want, however, to say a word or two more on the system rather than on the principle. I have stated my judgment on the principle applicable to the case, but the exact system by which the principle is applied is open to some observations. No doubt in the business of the City of London some working rules have to be adopted as between the Revenue and the companies, and I have little doubt that the Revenue is prepared to accommodate the companies if they ask for reasonable facilities. But it appears from the figures before us that an assessment has been made upon Mr. Hartland based upon an assessment of a previous year, an assessment which has no real contact with the facts of the existing year, but which was true in respect of the sums that he had received in a previous year, when his receipts had consisted of salary plus bonus, plus money paid to the Revenue. It seems to me that some care ought to be exercised to ascertain the real sum to which the officer is assessable, for (as in the present case) there may be reasons, individual to the particular person, justifying his reducing his assessment. In the present case, Mr. Hartland was entitled to deduct a certain amount for premium paid to life assurance offices and the like; and it does not seem right on the part of the Revenue that they should merely take a figure from the previous year and insert that as being the amount to which the officer is assessable or liable, because it was a figure true in the previous year, but which may not be true in the existing year of assessment. The facts as to the scheme and how it is exactly worked out are not before us, and I confine my observations, therefore, to saying that the matter is one that needs attention and care, because it is quite obvious that considerable mistakes may be made as between the Revenue and the particular official charged, and, more than that, as between the Revenue and the company. In the present case, the New Zealand Company were allowed to deduct as working expenses sums paid for and on behalf of their employees. If they have been allowed to deduct too large a sum, then the Revenue has lost the income tax

on their profits; if, on the other hand, they have not been allowed to deduct enough, then the company is entitled to further relief. I make these observations to show that the point has not escaped me, and that it is desirable that care should be exercised in working out the principle, although the principle itself is clear.

For the reasons I have given, the appeal must be dismissed, and dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The appellant is an officer in the employment of the New Zealand Shipping Company. The company has for many years adopted the practice of paying the income tax chargeable in respect of the salaries of each of its servants. It makes that payment voluntarily and without being under any obligation to the servant to do so; but it makes it in accordance with a practice which has been adopted for some considerable time, and, as I have said, makes the payment in respect of all its servants.

Now, the servant or officer is chargeable to income tax under Sch. E, and that tax is payable on all salaries, fees, wages, perquisites or profits whatsoever accruing by reason of such employments or pensions. The main question then is: Is the income tax on the salary which is paid by the company a profit accruing by reason of his employment? If it is, then the appellant is chargeable to income tax in respect of it under Sch. E.

It has been settled by a decision of the House of Lords that a mere voluntary payment, if it be made in respect of a man's office, may be a profit chargeable to income tax, notwithstanding its voluntary nature. That point was decided in the case of Easter offerings by *Blakiston* v. *Cooper*. (1) That the payment of income tax by the employer is a profit of the office of the employee, has been decided by the House of Lords in *North British Ry. Co.* v. *Scott*. (2) Taking those two principles together: first, that a voluntary payment may be a profit chargeable to income tax; and second, that the

(1) [1909] A. C. 104. (2) [1923] A. C. 37.

C. A. 1924

HARTLAND v. DIGGINES.

Warrington L.J.

payment of income tax in respect of salary may be an additional profit of the office in respect of which the salary is paid, it seems to me that the case is conclusive against the appellant. But I think the state of the authorities does not rest there; because in my judgment the decision of the House of Lords in *North British Ry. Co.* v. *Scott* (1), when one looks at the opinions expressed both by Lord Dunedin and by Lord Atkinson, who alone addressed the House on that subject, it is perfectly plain that to their minds there was no distinction, for their present purposes, between the payment made by an employer under contract with the servant, and a payment made by the employer voluntarily and without any contract with him, provided only that the payment was so made as to be an additional profit of the office.

In that case the House of Lords were dealing with the case of a railway company, which is assessed for the purposes of collection on the salaries which are paid to its servants—in the present case the servant is assessed directly, but that really makes no difference—and Lord Dunedin in reference to that case said (2): "And if the company chooses to deduct (in cases where they have not as here bound themselves by contract not to do so), it follows that the official's total emolument is the conditional salary of x pounds from which income tax was deducted. Then, if as here they elect not to deduct"—he says nothing about the contract there—"they are by their action making it that the total emolument of the official is not only the cash salary but also the sum necessary to maintain that cash salary at its undiminished figure"; and that sum, of course, is the income tax on the cash salary.

Lord Atkinson puts it in this way (3): "I think the same result"—that is, that the tax would be added to the salary—"would have followed even if the company, either from benevolence or from any other motive, declined to set off the amount they had paid for, or on behalf of, an officer in discharge of that officer's statutory liability, because in truth

(1) [1909] A. C. 104. (2) [1923] A. C. 37, 42.
(3) [1923] A. C. 37, 44.

the sum paid by the company is not a sum outside of the officer's salary or independent of it, but is a part of it." In my judgment, that case covers both the branches which are raised by this particular case, the two questions being, first, Is the payment of the income tax by the company a profit of the appellant's office? I think that is now well settled, and therefore, prima facie, it is liable to income tax. Second: Is it relieved of that liability by the fact that the company pays it voluntarily, and being under no legal liability so to do? It seems to me that both those points are decided against the present appellant.

I only wish to add this: that what is to be added to the salary for the purpose of income tax is not some notional sum agreed upon between the company and the Revenue, nor the tax paid in a previous year, or anything of that kind; it is the actual sum which, in the actual year of assessment, would be payable by the servant, but for the interposition of the employer. It is that sum which is to be added to the salary as part of the profits derived from his office.

I think the appeal fails and must be dismissed.

SCRUTTON L.J. The nominal appellant in this case is Mr. Harry Hartland, an employee, an accountant, in the service of the New Zealand Shipping Company; but who is the real appellant I do not quite understand. It does not seem to interest Mr. Hartland very much, because his income tax is paid for him by the company, and no claim is made upon him. If it is the company which is the appellant, one effect of the company succeeding in the appeal is that it will be able to deduct less as trade expenses, and will therefore have to pay more income tax on its profits. I am not quite clear which of them is the real appellant and why there is the appeal.

But on the point raised, which is of some importance, I should have very considerable sympathy with the argument put forward by the appellant, if it were not for two decisions of the House of Lords which appear to me to have settled

C. A. 1924

HARTLAND v. DIGGINES.

Scrutton L.J.

the point. The point is this: Mr. Hartland is employed at a salary of 500*l.* a year, but the New Zealand Shipping Company, in the words of the case, have for some years made a custom of paying the income tax in respect of the salaries of all their employees, though they enter into no agreement, either verbal or in writing, with the appellant, as to the payment of the income tax in respect of his salary. Thereupon the Crown says: "The salary upon which we propose to tax you, Mr. Harry Hartland, is the salary you receive: 500*l.*, plus the income tax which the company is paying for you"; and Mr. Hartland, or the real appellant, whoever he may be, objects to that, saying that Mr. Hartland does not receive anything additional to his salary; all that happens is that some one pays a debt of his, but that he does not receive anything; and saying that even if he is taken as having received something, he has not received it by virtue of any contract, but as an act of grace or charity, and that such a sum cannot be added to his income.

Now the first point, whether he has received a profit or emolument when all that has happened is that some one has paid a debt for him so that he has more money in that way, has, I think, been decided adversely to the contention of the appellant; first of all indirectly by the two cases of *Attorney-General* v. *Ashton Gas Co.* (1), as to the payment of dividends free of income tax, and of *Samuel* v. *Inland Revenue Commissioners* (2) in the case of the payment of dividends free of income tax; and lastly by the decision of the House of Lords in *North British Ry. Co.* v. *Scott.* (3) The argument put forward by the appellant's counsel in the latter case was, I think, identical with the argument which was put forward by Mr. Edwardes Jones, and I take the House of Lords to have decided that where what happens is that a person receives a salary and his employer pays the income tax, the salary he in fact receives is the actual salary plus the amount of the income tax as properly calculated. Therefore the first

(1) [1904] 2 Ch. 621. (2) [1918] 2 K. B. 553.
(3) [1923] A. C. 37.

point as to the receipt seems to be settled by the decision of the House of Lords.

But I understand Mr. Edwardes Jones to say that that is all very well where the person receives the benefit of the income tax by virtue of a contract with his employer, but if he receives it as an act of grace from his employer, without any contract, that set of facts does not come within the decision of the House of Lords.

It seems to me that the second decision of the House of Lords which settles that point is *Blakiston* v. *Cooper* (1), the case of the Easter offerings made to a clergyman purely voluntarily, there being no contract of any kind to pay them, which were held by the House of Lords to be emoluments resulting from his office, though purely voluntary.

On the facts in this case it is clear, that it is because the appellant is an employee of the company that the company pays his income tax, and that that is clearly an emolument resulting from his office of accountant of the company. The two decisions of the House of Lords, therefore, seem to bind me to hold that the appellant must fail in this case.

As my brothers have said, I also wish to add that I am not at all satisfied with the apparent system which is pursued here. The company make some arrangement with the Inland Revenue—to which arrangement the appellant is not a party—which results in the amount due in respect of this particular servant being assessed at 80*l.* 5*s.*, which the company are then allowed to take from their profits, as trade expenses, and avoid income tax on it. The appellant seems to have nothing whatever to do with the fixing of that amount; and what happened in this case was that the Crown having assessed 80*l.* 5*s.*, said to be the sum so paid by the company in respect of the salary of the appellant as income tax, it is added to the 500*l.* and produces 580*l.* 5*s.*, and then duty is claimed on the appellant for 65*l.*, whereas 80*l.* 5*s.* has been added to his salary (according to the case) in respect of income tax.

The explanation given by Sir Henry Slesser, after inquiry, is that there was some amount of bonus in the previous year.

(1) [1909] A. C. 104.

C. A. 1924

HARTLAND v. DIGGINES.

Scrutton L.J.

There is nothing said about that in the case. 80*l.* 5*s.* is there stated to be the sum paid for income tax, and not for income tax plus bonus. But if that sum includes the bonus paid in the previous year, the previous year has nothing to do, under Sch. E, with the assessment of this year, and the whole system seems to be unsatisfactory.

But the Crown say that they are quite willing to look into the matter in this case, and I only suggest that they should not only do so, but should devise a more satisfactory system for assessing these cases in the future. As I understand, they have to add to the actual salary such a sum for income tax paid as, if deducted from the assessed income, would give the actual salary.

Further, it is obvious that in fixing the amount the actual employee ought to have some voice in the matter. At present he has none, and this has resulted in some curious figures.

I agree that the appeal should be dismissed.

POLLOCK M.R. It is not necessary to make an order for the case to go back. We had better leave it in this way: Appeal dismissed with costs, the actual figures to be settled on a reference to the Commissioners.

Appeal dismissed.

Solicitors for appellant: *Thomas Eggar & Son.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.

1924

Nov. 10, 11, 12, 24.

WHELAN (INSPECTOR OF TAXES) *v.* HENNING.

Revenue — Income Tax — Foreign Possessions — "Income" — "Source of income"—Assessment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., r.* 1.

The respondent owned shares in a company incorporated outside the United Kingdom. For the three years preceding 1920, the company declared dividends, and the amounts thereof due in respect of the respondent's shares were remitted to him in this country. For the year 1920 no dividend was declared, but the respondent was assessed to income tax for the year ending April 5, 1921, under Sch. D, Case V., in the sum of 3424*l.*, being the average dividend received by him for the three preceding years:—

Held, that taxation under the Income Tax Acts was on "income" and not on "sources of income," and that the respondent's liability depended not, as the Crown contended, upon the possession of the shares in the year of assessment, but upon the receipt of some profit therefrom in that year.

Brown v. *National Provident Institution* [1921] 2 A. C. 222 discussed and applied.

Decision of Rowlatt J. [1924] 2 K. B. 421 affirmed.

APPEAL from the decision of Rowlatt J. (1) on a case stated under the Income Tax Act, 1918, s. 149, by General Commissioners of Income Tax.

The facts are fully stated in the report of the case in the Court below, and were shortly as follows:—

The respondent, Captain R. H. Henning, who resided in the United Kingdom, held 1000 shares of Rs.100 each in the Vincit Tea and Rubber Co., Ld., which was incorporated in Ceylon. The whole of the dividends declared on his holding had been remitted to this country. Up to April 5, 1920, the respondent had been assessed under Class V., Sch. D, r. 1, of the Income Tax Act, 1918, on the basis of the average of the three preceding years (as directed in r. 1), except in the earlier years before a three years' average was obtainable. For the year 1921 an assessment was made upon the respondent by the Commissioners at Dorchester for 3424*l.*, as follows:—

(1) [1924] 2 K. B. 421.

C. A. 1924

WHELAN v. HENNING.

For the year ending.	Dividend declared.	Dividend received.
April 5, 1918 ..	Rs.33,000 ..	3730*l.*
April 5, 1919 ..	Rs.35,000 ..	2629*l.*
April 5, 1920 ..	Rs.53,000 ..	3914*l.*
		10,273*l.*

Average for three preceding years, 3424*l.* In 1920 the company made a small net profit, but no dividend was declared, and no income remitted to respondent for the year ending April 5, 1921.

For the respondent it was contended :—

(1.) That Case V., r. 1, merely provided principles by which income was to be measured, but that before the respondent could be taxed there must be a taxable income.

(2.) That the computation of tax was governed by the charging section under Sch. D, cl. 1, which provided that tax under Sch. D should be charged in respect of "annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere," and that therefore tax was only leviable on income.

(3.) He relied on the judgments of Viscount Haldane, Lord Atkinson, and Lord Sumner in *Brown* v. *National Provident Institution* (1); and on the judgments of Lord Macnaghten in *Tennant* v. *Smith* (2) and in *London County Council* v. *Attorney-General.* (3)

(4.) That the source of the respondent's income was not the holding of shares, but the amount which by resolution of the company was divided among the shareholders, and that as no income had arisen from such source during the year of assessment no income tax was payable in respect of such source.

(5.) That the average income of the three preceding years could not be deemed to be an income, which in fact never existed.

(1) [1921] 2 A. C. 222. (2) [1892] A. C. 150, 164.
(3) [1901] A. C. 26, 35.

It was contended on behalf of the Crown :—

(1.) That the source of income was the holding of shares in the company by the respondent and that the declaration of a dividend on such shares did not constitute the source.

(2.) That the charging section under which the respondent was liable was Sch. D, cl. 1 (*a*) (i.), and under Case V.

(3.) That the Rules applicable to Case V. were to be read in conjunction with the Rule applicable to Case I.

(4.) That in support of this contention liability to assessment depended on the existence of the source of income in the year of assessment.

(5.) That Case V. of Sch. D had to be considered in conjunction with Cases I. and II., and that once the existence of the trade, profession, employment or vocation was shown, it was caught by the Rules applicable to those Cases, and was liable to be assessed, and that the introduction of the word "income" in Case V. did not affect the principle that the source of income when once established gave rise to an assessment, and that on a three years' basis.

(6.) That s. 34 of the Income Tax Act, 1918, provided for relief in case a person sustained loss, and that if the contention of the respondent was correct such section had no meaning or application.

(7.) That *Brown* v. *National Provident Institution* (1) was distinguishable, inasmuch as there the source of income had ceased to exist.

The Commissioners held that the respondent was not liable to be assessed on the average of the three preceding years, and they therefore discharged the assessment.

On an appeal by the Crown Rowlatt J. held that the respondent's liability depended not upon the possession of shares in the year of assessment, but upon the receipt of some profit therefrom in that year. He accordingly affirmed the decision of the Commissioners.

The Crown appealed. The appeal was heard on November 10, 11, and 12, 1924.

(1) [1921] 2 A. C. 222.

C. A. 1924

WHELAN v. HENNING.

Sir Patrick Hastings K.C. and *R. P. Hills* for the Crown.
Rayner Goddard K.C. and *G. M. Welsford* for the respondent.
The arguments sufficiently appear from the case stated and the judgments.

Cur. adv. vult.

Nov. 24. The following written judgments were delivered.

POLLOCK M.R. This is an appeal from a decision of Rowlatt J. given on July 2, 1924, whereby he dismissed the appeal of the Crown from the decision of the Commissioners for the General Purposes of the Income Tax who had discharged the assessment upon the respondent Captain Henning.

Captain Henning resides in the United Kingdom and is the holder of 1000 shares in the Vincit Tea and Rubber Co., Ld. This company is incorporated in Ceylon, and has from time to time declared dividends which have been remitted to the respondent in this country.

The question arises in reference to an assessment upon him made for the financial year ending April, 1921, under Sch. D, Case V., r. 1, on the basis of the full amount received by way of dividend upon the shares on an average of the three preceding years, as directed in Case I., in accordance with the standard laid down in Case V.

The respondent has no other income from foreign possessions assessable under Case V., and on July 22, 1920, he made a return in the sum of 3424*l.*, as being the average of the dividends received in the three preceding years, on which he submitted to liability for the current year of charge. In the year 1920 no dividend was declared by the company and no income was remitted to the respondent during the tax year ending April, 1921. The respondent thereupon filed an amended return showing no income under Sch. D, and submits that Case V., r. 1, merely provides certain principles by which income has to be measured, but that before he can be subject to taxation there must in the year of assessment be a taxable income.

The respondent agrees that if he had received any income, however small, during the year of assessment, the assessment of 3424*l.* would be in order as the correct estimate of his income for that purpose; but that as the whole income has totally failed, there are no profits and gains forming an income which can be made the subject of assessment, by whatever measure the income would have fallen to be assessed if it had existed.

For the Crown it is contended that Case V. of Sch. D must be considered in conjunction with Cases I. and II., and that once a trade, profession, employment, or vocation is found to exist, the rules under Cases I. and II. apply, and there is a liability to assessment: that the words of r. 1 of Case V., "The tax in respect of income arising from stocks and shares . . . . in any place out of the United Kingdom shall be computed," etc., are not to be construed as making the receipt of income the condition of liability; but that, when the source of income has been found and established, there is a liability to assessment whether in fact income be actually received or not. The Crown invoke the practice established of assessing a continuing business on the average profits of three preceding years, even though during the year of assessment no profits may be derived therefrom. Counsel for the Crown further claim that if the liability to assessment depends upon the actual receipt of income during the year of assessment, it will not be possible for the subject to make a return and the revenue authorities to fix the assessment upon that return, for both those operations take place in the first six or nine months of the year of assessment, while the tax is collected during the latter months of the financial year for which the assessment is made, and in which the tax is paid. Sir Patrick Hastings drew attention to the terms of ss. 46–49 and 176 of the Income Tax Act, 1842, in support of his argument as to the scheme of the Income Tax Acts, and to several sections where "source of income" is mentioned, e.g., s. 52, which speaks of the amount of such profits and gains arising to such person from all and every the "sources chargeable" under this Act. He also referred to

C. A. 1924

WHELAN v. HENNING.

Pollock M.R.

the speech of Lord Macnaghten in *Colquhoun* v. *Brooks* (1), where he says: "I use the expression 'source of income,' because it is as a source of income that the Act contemplates and deals with property, and everything else that a person chargeable under the Act may have, and the Act itself, in s. 52, uses the expressions 'sources chargeable under the Act' and 'all the sources contained in the said several schedules' as describing everything in respect of which the tax is imposed."

These arguments are formidable, and if the matter were free from superior authority, I should feel bound to consider them fully, particularly in view of the opinion expressed by Viscount Cave in *Brown* v. *National Provident Institution.* (2) Viscount Cave's opinion however was not accepted by the majority of the House of Lords, and I see no ground for distinguishing the principle of that decision from that to be applied to the present case. The tax claimed to be charged in *Brown's* case (2) was in respect of profits of an uncertain value not charged in Sch. A estimated in accordance with r. 2 of that case "at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year"; but I am unable to find a real distinction on that ground from the tax sought to be charged in the present case under Case V. on an average of the three preceding years. Both cases are branches of Sch. D, and under that schedule annual profits or gains are charged, though the measure of computation is not the same.

In view, however, of the importance of any decision which may appear to conflict with the system of assessing continuing businesses upon the basis of the three years' average, before the actual results of trading can be ascertained, I desire to confine my decision within the limits of the present case—namely, to an assessment falling under Case V. of Sch. D, where there have in fact been no profits, and that fact has been made plain by an amended return. Incidentally it may be pointed out that the possibility of correcting a return in certain cases so as to make it accord with the facts as

(1) (1889) 14 App. Cas. 493, 516. (2) [1921] 2 A. C. 222, 239.

realized originally existed under ss. 133 and 134 of the Act of 1842 and s. 24 of the Finance Act, 1907, and where a loss was sustained under s. 23 of the Customs and Inland Revenue Act, 1890, now replaced by s. 34 of the Act of 1918, and see Miscellaneous Rules applicable to Sch. D, r. 3. Lord Haldane also appears in *Brown's* case (1) to entertain no doubt that where a business continues that is a source in respect of which a return and assessment may be made, for the profits and gains of a continuing business are the subject of assessment. (2)

Without further discussing the argument for the Crown, the House of Lords appears to have decided already in *Brown's* case (3) that if a source of income dries up and no income accrues, then no tax can be levied or collected in respect of a non-existing income. Lord Atkinson says so in terms (4), and see his words quoted by Rowlatt J. (5) Lord Haldane says (6): "It seems to me that the true meaning of the words the Legislature has used is that the tax is intended as matter of basic principle to be on profits and gains forming income in the year of assessment, though not measured by the income of that year. If a man carries on business by buying and discounting bills, this is, I think, as much a source of profit as any other for the purposes of the words employed. As in the case before us it is agreed that there was no such source, I think that we have to assume that there was no income on which to base the tax."

Lord Sumner (7) rejects the suggestion that the subject himself could be the source of the profit, as had been suggested by Rowlatt J. in that case, and says that that will not suffice to bring into operation a notional measure of computation, "no profits of the kind having been earned in the year of charge at all."

It appears to me that the present case is covered by the reasoning to which I have referred. I venture to doubt whether the inconvenience anticipated will in fact arise, for

(1) [1921] 2 A. C. 222, 230.
(2) Ibid. 235.
(3) Ibid. 222.
(4) [1921] 2 A. C. 246.
(5) Ibid. 250.
(6) Ibid. 236.
(7) Ibid. 260.

C. A. 1924

WHELAN v. HENNING.

Pollock M.R.

although the House of Lords has clearly laid down that there must be profit and gains assessable in the year of assessment, they have not purported to disapprove of the system of requiring returns for assessment in ordinary course, even though the profits and gains are not realized or visible at the time it is made.

The appeal must be dismissed with costs.

WARRINGTON L.J. The question in this case is whether the respondent, Captain R. H. Henning, was liable to be assessed to income tax in respect of profits or gains arising or accruing to him under Case V. mentioned in para. 2 of Sch. D of the Income Tax Act, 1918. Case V. is tax in respect of income arising from possessions out of the United Kingdom. The respondent resides in this country, and is possessed of certain shares in the Vincit Tea and Rubber Co., Ld., and is entitled to receive the dividends thereon. They have been remitted to him in the United Kingdom, the company being a company established in Ceylon. Under r. 1 of the Rules applicable to Case V. the tax in respect of income of such a nature is to be computed on the full amount thereof on an average of the three preceding years, that is to say, the three years preceding the year of assessment. In the present case the year of assessment was the year ending April 5, 1921. During that year the company declared no dividend. The average of the three preceding years was 3424*l.*

The respondent contended that, inasmuch as he received no income from the source in question during the year of assessment, the provision as to the mode of computation did not come into operation and he was not liable to tax for that year. He relied on *Brown* v. *National Provident Institution*. (1)

The Commissioners accepted his contention and discharged the assessment. Rowlatt J. took the same view, and the Crown appeals.

The contention of the Crown is that, inasmuch as in this case the possession from which the income in the preceding years has been derived continues to exist, the case is

(1) [1921] 2 A. C. 222.

distinguishable from and is not covered by the decision in *Brown* v. *National Provident Institution* (1), and that in such a case the fact that in the year of assessment it does not prove to be an actual source of income is immaterial, and the taxpayer is still liable to tax computed as directed by r. 1 under Case V.

I should mention that the respondent originally made a return on the basis of the average of the three preceding years, but on discovering that the dividends would not be paid he made an amended return showing "no income" from the source in question. This amended return would seem to have been accepted as a sufficient return, and no technical objection on this ground has been raised.

The real question is whether the decision in *Brown* v. *National Provident Institution* (1) covers the present case, in which, though the shares which constitute the "possession out of the United Kingdom" do not in the year of assessment produce any income, they remain in the hands of the possessor and may thereafter again become a source of income.

I should like to say that in this judgment I propose to confine myself to the consideration of the case before me, that is to say, a case arising under Case V. of Sch. D, and it must be left for another tribunal to determine the position under other circumstances and under other cases of the same schedule, or under other schedules.

Brown's case (1) arose under Case III. of Sch. D to the Act of 1842, and the particular income in question was profits on discounts. Under Case III. the tax is to be computed on the full amount arising in the year preceding the year of assessment. In that year the National Provident Institution made profits from dealings in Treasury Bills, that is to say, "on discounts" within the meaning of Case III., but in the year of assessment they had no transactions in Treasury Bills and therefore made no such profits. In those circumstances it was held by the majority of the House of Lords that they were not liable to be assessed under Case III. I have carefully read and considered the speeches of the three learned Lords who were the majority in that case,

(1) [1921] 2 A. C. 222.

C. A. 1924

WHELAN v. HENNING.

Warrington L.J.

and I think it clear that they proceeded on the broad principle that if in the year of assessment there were no profits from a particular source there was no taxable income from that source, the existence of such income being an essential condition of the liability to tax, and that the rule referring to the profits of the preceding year only provides a measure by which the amount of the taxable income, if it exists at all, is to be ascertained.

The only distinction suggested by the Crown between the last mentioned case and the present is that in the present case the respondent remains the possessor of the shares from which the profits, when there are any, arise. But in my opinion, bearing in mind the principle on which the House proceeded, the difference in the facts of this case from those in the case before them is no real distinction. The tax is on income, not on that which is the source of income. If there is no income from the particular source it can make no difference that there may be income from it in a succeeding year. It ceases to be a source of income in the year of assessment, and that in my opinion brings the case within the decision of the House.

It was suggested by counsel for the Crown that if the view I have expressed is correct a person carrying on a trade or possessing any property from which there might or might not be income in the year of assessment could not be assessed until the expiration of that year. But I do not think this inconvenience need arise. The man might well be assessed on the hypothesis that there would be profits, leaving it to him to establish, if it were the fact, that there were no profits and that he was therefore not liable.

On the whole I think the appeal fails and must be dismissed.

SCRUTTON L.J. Captain Henning originally made a return for assessment to income tax under Case V. of Sch. D of profits derived from shares in a Ceylon company, calculated on the average of the three preceding years. At the end of the year of assessment he asked to amend that assessment, as the company paid no dividend in the year, and contended that,

there being no profits accruing to him in the year of assessment, there was nothing to assess by the three years' average or any other rule. He relied on the recent decision of the House of Lords in *Brown's* case (1), a decision under Case III. of Sch. D, that where there were no "profits or discounts" in the year of assessment, you could not assess on the income of the previous year as provided by the rule of computation of Case III. of Sch. D. The Commissioners accepted his contention; Rowlatt J. affirmed their decision, and the Crown appeal to this Court.

I also am of opinion that the case is concluded here by the decision of the House of Lords in *Brown's* case. (1) I understand the judgments of the three Lords who formed the majority, to proceed on the lines that what is assessed is profits made in the year of assessment; that if there are no profits there can be no assessment; and that the fact that if there are profits they are to be computed in accordance with an average of previous years does not enable such a computation to be made when there are no profits to assess. This appears to me to be the reasoning of the majority of the House of Lords, and I do not cite their judgments in detail. I can see no difference on this head between Case III. of Sch. D, the subject matter of *Brown's* case (1), and Case V., the subject matter of this case. Sch. D imposes a tax "in respect of annual profits and gains." Case V. deals with profits "in respect of income arising from possessions out of the United Kingdom assessed on an average of the three preceding years." Case III. is in respect of "profits" and other "income," "computed on" the income of the previous year. If in the latter case you cannot "compute" if there is no income in fact arising in the previous year, so in the former case the absence of income in fact in the year prevents the statutory measure by preceding years being applied to it.

I understood the argument of counsel for the Crown to be that this case was distinguishable from *Brown's* case (1), for in the latter there was no source of income in the year of assessment, no discounts having been effected, while in

(1) [1921] 2 A. C. 222.

C. A. 1924

WHELAN v. HENNING.

Scrutton L.J.

this case there was a source of income, though in the year no income flowed from it. In my view, and I think in the view of the House of Lords, taxation under the Income Tax Acts is on "income," not on "sources of income." The title of the Act of 1842 is An Act for granting to Her Majesty duties on "profits." It is true that here and there, as in s. 23 of the Act of 1918, the expression "sources of income" is used and the assessment said to be on the "source," but this is quite inaccurate unless the expression is taken as elliptical for assessment on profits from a source.

Counsel for the Crown apprehended great difficulties from an affirmance of this decision, if they could not assess during the year, till they knew there were profits during the year. I do not share their apprehensions. If the Crown know there have been profits from a source in the preceding years, and do not know the source has ceased to flow, they may well assess according to the rules and leave the subject to show there is in fact nothing to assess in that year.

I wish however to confine my decision at present to Case V. of Sch. D, the case before us, and leave other cases on schedules to be dealt with when they arise. The appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Hinds & Roberts, for Lock, Reed & Lock, Dorchester.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1924
Oct. 28.

PEART *v.* BOLCKOW, VAUGHAN AND COMPANY, LIMITED.

Employer and Workman—Compensation—Claim by Dependant—Partial Dependency—Evidence of—Assessment of Compensation—Probability of Increase in Earnings of deceased Workman—Standard of Living—Right of County Court Judge to use personal Knowledge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sch. I., para.* 1 (*a*) (*ii*)—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 22.

By s. 22 of the Workmen's Compensation Act, 1923: "For the purposes of the principal Act, a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position":—

Held, that the effect of the section was to restore the rule for determining dependency adopted by the Court of Appeal in *Simmons* v. *White Bros.* [1899] 1 Q. B. 1005, but rejected by the House of Lords in *Main Colliery Co.* v. *Davies* [1900] A. C. 358—namely, that in order to bring himself within the Workmen's Compensation Act, 1906, as a dependant an applicant for compensation must show that he was to some extent dependent on the earnings of the deceased workman for the ordinary necessaries of life, having regard to his class and position in life.

The applicant was the father of a boy of fourteen years of age who was killed by an accident arising out of and in the course of his employment as a cleaner-out in the respondents' pit. The applicant claimed compensation on the ground that he was partially dependent on the earnings of the deceased. The applicant was a miner earning 3*l.* 11*s.* a week, with free house and coals. His eldest son, aged sixteen years, worked in the pit and earned 1*l.* 0*s.* 6*d.* a week. The deceased earned 15*s.* 3*d.* a week. Neither the mother nor the youngest son, aged eleven years, earned anything. It was admitted that the deceased would have advanced by rapid stages, as he grew and gained experience, to higher wages. The county court judge thought that the injury to the father at the time of the deceased's death was small, and that to that slight extent there was dependency at the time of the death, but having regard to the fact that he was only fourteen years of age at the time, and in the ordinary course would have contributed increasing sums from time to time, he was of opinion that 50*l.* added to the 15*l.* which the respondents had already paid for funeral expenses was "reasonable and proportionate to the injury." He accordingly made an award for 65*l.*:—

Held, that upon the admitted facts, supplemented by his own knowledge and common sense, there was evidence before the county court judge upon which he could find that, after feeding and clothing

C. A.
1924

PEART
v.
BOLCKOW, VAUGHAN & CO.

the boy, there was a sufficient actual contribution by him to the provision of the ordinary necessaries of life for the family to constitute a basis for compensation.

Held, also, that the county court judge, having found that the father was a partial dependant of the boy, was entitled, in determining what sum he ought to allow for compensation which was "reasonable and proportionate to the injury" suffered by the father, to take into consideration, as he had done, the possibility of an increase in the earnings of the boy had he lived.

APPEAL from an award of the judge of the Middlesbrough County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The applicant was the father of a boy of fourteen years of age who was killed by an accident arising out of and in the course of his employment as a cleaner-out in the respondents' pit on April 11, 1924. The applicant claimed compensation on the ground that he was partially dependent on the earnings of the deceased. The facts, which were not in dispute, were as follows: The applicant was a miner earning 3*l.* 11*s.* a week, with free house and coals estimated to be worth an additional 5*s.* a week. His eldest son, aged sixteen years, worked in the pit and earned 1*l.* 0*s.* 6*d.* a week. The deceased earned 15*s.* 3*d.* a week. Neither the mother nor the youngest son, aged eleven years, contributed anything to the "family purse."

The claim came before the county court judge on July 14, 1924, who made an award in favour of the father for 50*l.* in addition to a sum of 15*l.* which had been paid into Court by the respondents for the funeral expenses of the deceased. The county court judge stated his reasons for his award in a considered judgment in the course of which he said: "It was admitted that the deceased would have advanced by rapid stages as he grew and gained experience to higher wages. Thus in one to two years he would be getting over 1*l.* and so at about twenty-one it would be possible for him to reach wages such as his father. That this progressive increase in wages and consequent increase in deceased's contribution to what has been called 'the family purse' may be taken into account in estimating compensation, is shown by *Rennoldson* v.

Ellerman Wilson Line (1) and *Sheldon* v. *Butterley Co.* (2) Mr. Richardson for the respondents argued that if the total wages—'the family purse'—be divided by five, the number of the family, the result, about 1*l.* 2*s.* each, is more than the deceased's wages, and therefore that there was no advantage to the family from his earnings after he was fed and clothed, and therefore no injury which could give rise to compensation. But I think this argument is fallacious, inasmuch as it places the cost of a lad of fourteen as equal to that of adults, two of whom are the heads of the family. It also leaves out of account that the deceased's contributions would increase progressively. I thought the 'injury' at the time of his death small and that to this slight extent there was dependency at the time of his death, but considering that he was only fourteen at the time, that in the ordinary course he would contribute increasing sums for some years to come. I thought 50*l.* added to the 15*l.* the employers had already paid for the funeral 'reasonable and proportionate to the injury.' The definition of partial dependency in s. 22 of the Act of 1923 is that which I have applied here. The deceased workman contributed to the 'family purse,' that is, he contributed to 'the provision of the ordinary necessaries of life' of the family. The contribution was small, but this only affects the quantum of compensation, not the fact that there was a contribution and therefore dependency. If I thought that the cost of maintaining the deceased was greater than the wages he was bringing in, it would have been my duty to find that there was no dependency, on the authority of *Main Colliery Co.* v. *Davies* (3); *Tamworth Colliery Co.* v. *Hall* (4) and many other cases. But from my knowledge of the life in miners' families in Durham and Yorkshire derived from many hundreds of arbitrations and orders for the disposition of compensation amongst miners' dependants, I am satisfied that there was a balance from deceased's wages after he was fed and clothed, that, in fact, there was a

(1) (1918) 11 B. W. C. C. 70.
(2) [1919] 2 K. B. 600.
(3) [1900] A. C. 358.
(4) [1911] A. C. 665.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & Co.

contribution left for the 'family purse,' and therefore a basis for compensation."

The respondents appealed. The appeal was heard on October 28, 1924.

A. Neilson K.C. and *T. Richardson* for the appellants. The question how far a member of the family of a deceased workman was dependent on his earnings within the meaning of the Act of 1906, is a question of fact to be determined by the county court judge upon a consideration of all the circumstances of the case: *Tamworth Colliery Co.* v. *Hall* (1); *Main Colliery Co.* v. *Davies.* (2) In the latter case Lord Halsbury (3) suggested that the test to be applied was: "What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family." Under s. 22 of the Act of 1923 the position has now been altered. That section provides that "For the purposes of the principal Act, a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." That brings the matter back to a money basis.

[WARRINGTON L.J. It looks as if the section was intended to re-enact the decision in *Simmons* v. *White Bros.* (4)]

That case was a decision under the Act of 1897. The effect of s. 22 of the Act of 1923 is that a person is not to be deemed a dependant of a deceased workman unless he was dependent on him for the ordinary necessaries of life. In the present case there was no evidence before the county court judge of any special circumstance, the only evidence being the admitted figures. As a test of the dependency of the applicant, if the total amount of the weekly wages of the family before the death of the deceased be divided by five and the total amount of their weekly wages after the death be divided by four it will be found that in the latter case

(1) [1911] A. C. 665.
(2) [1900] A. C. 358.
(3) [1900] A. C. 358, 362.
(4) [1899] 1 Q. B. 1005.

an additional sum of about 2*s.* a week will be available for each member of the existing family, thereby showing that the applicant has suffered no injury from the death of the deceased. The county court judge was therefore wrong in law in holding that the applicant was entitled to any compensation over and above the 15*l.* paid into Court by the respondents as and for funeral expenses, when the applicant was not and could not be, in fact, dependent partially or at all on the contributions of the deceased for the provision of the ordinary necessaries of life suitable for persons in his class and position: *Phillips* v. *Kershaw, Leese & Co.* (1)

Further, in view of the fact that there was no present dependency at the time of the death of the deceased, the county court judge was wrong in taking into consideration that the deceased might have contributed increasing sums to the applicant in the future.

The county court judge was also wrong in relying upon his personal knowledge of the standard of living prevailing in miners' families in his district. The only case in which a county court judge is entitled to rely upon his personal knowledge is that of the state of the labour market in his district: *Roberts and Ruthven, Ld.* v. *Hall.* (2)

It is submitted, therefore, that there was here no evidence upon which the county court judge could hold that the applicant was partially dependent upon the earnings of the deceased for the ordinary necessaries of life. The award ought therefore to be set aside and an award made in favour of the appellants.

C. F. Lowenthal for the respondent. The appeal in this Court has been argued as one raising a question under s. 22 of the Act of 1923, whereas the only question argued before the county court was whether the contribution of the deceased workman amounted to more than the cost of his maintenance.

It is submitted that the fact that the deceased contributed to the family purse is prima facie evidence to bring the case within s. 22 of the Act of 1923. The father was under a legal obligation to maintain his son, and therefore a contribution by

(1) [1920] 3 K. B. 297, 304. (2) (1912) 5 B. W. C. C. 331.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

the son constitutes the father a dependant of the son to that extent: *Main Colliery Co.* v. *Davies* (1); *Phillips* v. *Kershaw, Leese & Co.* (2) But if the maintenance equals or exceeds the contributions and future contributions will not exceed the cost of maintenance then there is no "injury" within Sch. I., para. 1 (*a*) (ii): *Tamworth Colliery Co.* v. *Hall.* (3) The arithmetical test suggested by counsel for the appellants is fallacious, as it takes no account of the fact that the requirements of the various members of the family differ. The father would naturally require more than the younger members of the family. Here the county court judge has found that there was dependency. If he is right in that finding, the amount he may award is (within proper limits) a matter within his discretion, and this Court will not interfere with his award.

Further the county court judge was entitled to take into consideration the possibility of a future increase in the earnings of the deceased workman had he lived: *Sheldon* v. *Butterley Co.* (4)

A. Neilson K.C. replied.

POLLOCK M.R. In this case the facts were that a boy aged fourteen, who was employed by Bolckow, Vaughan & Co., Ld., as a cleaner-out, suffered unhappily a fatal accident on April 11, 1924. He lived, at the time of his death, with his father and mother and brothers, and the father on June 11, 1924, made a claim for compensation on the ground that he as a dependant had suffered injury by reason of the boy's death, under circumstances to which I must refer in detail more fully. The claim came before the county court judge on July 14, 1924, when the judge awarded to the father as the dependant, a sum of 50*l.* The employers appeal, and they say there was no evidence which would justify a finding that the father was a dependant of the son; that the learned county court judge has not applied a proper test; and that in the circumstances, the case is one in which an award ought

(1) [1900] A. C. 358, 361, 362, 363.
(2) [1920] 3 K. B. 297, 304.
(3) [1911] A. C. 665.
(4) [1919] 2 K. B. 600.

to have been made in favour of, and must now be made as a matter of law against, the applicant, the father.

The figures as to the earnings of this family were agreed. It appears that the father was a miner, who was earning 3*l.* 11*s.* a week; the mother was not a contributor to the family income; the eldest son, aged sixteen, was employed in the pit and contributed a sum of 1*l.* 0*s.* 6*d.* a week; the deceased was earning 15*s.* 3*d.* a week, and there was another brother of more tender age—namely, eleven years old, who was at the time not a contributor. Adding those figures together, the earnings of the father, the elder brother and the deceased, they amount to a total of 5*l.* 6*s.* 9*d.* a week; to which must be added a nominal, but apparently an agreed sum of 5*s.* a week, which represents, or is supposed to represent, the advantage which the father enjoyed of a free house and coals. If the total is added together, with the free house and coals at a sum put of 5*s.* a week, the gross total of the family earnings is 5*l.* 11*s.* 9*d.* a week. When the earnings of the deceased are taken away, that is 15*s.* 3*d.* a week, there is left a sum of 4*l.* 16*s.* 6*d.* a week for the four persons who are the survivors, in place of 5*l.* 11*s.* 9*d.* per week contributed for the purpose of maintaining five persons.

We have to consider the terms of the Workmen's Compensation Acts, and I go back at once first of all to the Act of 1906. In s. 13, which is the interpretation section, it is provided that: "'Dependants'" means "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death" and a "'member of a family'" is interpreted to include (amongst others) a husband, a father and a son. Therefore, within the meaning of that interpretation clause, it was possible for the father to be a dependant of the son, in part dependent upon the earnings of the workman at the time of his death, and where there are persons in part dependent upon the earnings of the workman at the time of his death, then Sch. I. is to be looked at to ascertain the scale and conditions of compensation. The Schedule, by para. 1 (*a*) (ii) provides: "If the workman"—I leave out the immaterial words—

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Pollock M.R.

"leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." I pause there for a moment. The claim of the father depends upon his right to come before the Court as a dependant, and in order to be a dependant he has to show that he was in part dependent upon the earnings of the workman at the time of his death. When that has been established, then you can apply the Schedule and ask for the compensation for the injury suffered by the surviving dependant estimated at what is reasonable and proportionate to the injury to the said dependant. I have for good reason indicated that first we have to find whether the father was a dependant, and, secondly, what is the reasonable compensation for the injury suffered by him?

In determining the first point we must look to see whether he was a dependant on the earnings of the workman at the time of his death, that is the relevant time. In the present case the boy was contributing a sum of 15*s.* 3*d.* a week to the "family purse," a phrase which has been used as the alternative of the aggregate of the total wages earned by the whole family, for I gather that all the wages earned by the members of it were put together, and, in the hands of the father, treated as a family purse, and used for the purposes of the family. It is said by Mr. Neilson and Mr. Richardson, who appeared for the appellants, that upon those facts, if you take the figures, you will find, having regard to the totality of the wages earned before, and the totality of the wages earned after the death, and by dividing up the number of persons who were receiving their livelihood out of this family purse, counting heads and dividing the number of heads into the total sum received, that before the death the amount per head was 1*l.* 2*s.* a week; after the death and the loss of the 15*s.* 3*d.* a week, dividing the number of heads into the amount of the family purse, you will find that it amounts to 1*l.* 4*s.* a week, and, therefore,

each individual member of the family was the better off by 2*s.* a week, or the whole family, adding the amount to be distributed among the total of four together, was better off by 8*s.* a week after the death. It is argued that, having regard to that fact, or rather to the inference which is necessarily to be drawn from those figures, it cannot be said that there was any injury or loss suffered by the family owing to the unhappy death of this young boy.

Now in 1923, another Workmen's Compensation Act was passed, for the purpose of amending the Act of 1906, the Act which so far I have referred to, and s. 22 of the Act of 1923 contains this provision: "For the purposes of the principal Act, a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." The two Acts of 1906 and 1923 are to be read together, and the first question one has to consider is, has s. 22 modified the principle of interpretation which must be applied to the Act of 1906? It is to be observed that in 1899 *Simmons* v. *White Bros.* (1) was decided, in which the members of the Court of Appeal (A. L. Smith, Collins, and Romer L.JJ.) approved of the statement as to the test of dependency in Minton-Senhouse and Emery on Accidents to Workmen, p. 156, that "It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life." That question came before the House of Lords in *Main Colliery Co.* v. *Davies* (2) and *Simmons* v. *White Bros.* (1) was there discussed. Lord Halsbury, in giving judgment, said (3) that he was quite certain "that no human intellect would be able to ascertain exactly what the standard was if one had to deal with such a question—a standard dependent upon what was the ordinary course of expenditure

(1) [1899] 1 Q. B. 1005. (2) [1900] A. C. 358.
(3) [1900] A. C. 358, 362.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Pollock M.R.

in the neighbourhood and in the class in which the man lived," and he in effect did not accept the statement which had commended itself to the members of the Court of Appeal. He there treated the question of dependency as one to be solved by a wider rule remote from and apart from any question of necessaries or standard of class or position, for he said (1): "What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family seems to me to be the only thing which the county court judge could properly regard."

It is plain, therefore, that in 1900 this question of dependants and its meaning was left by the House of Lords much wider than it had been left by the Court of Appeal, and we now find that s. 22 of the Act of 1923 restores or puts into the Act, in effect into the principal Act, the very words which had been used by Minton-Senhouse and Emery in their book, and approved by the three members of the Court of Appeal—namely, the words "dependent means dependent for the ordinary necessaries of life for a person of that class and position in life," and it may be that a task is imposed upon the county court judge which is extremely difficult for him to perform. Perhaps it is fair to observe that I do not think the wider principle enunciated by Lord Halsbury would be much easier of application, but now s. 22 must be looked at, Dependency is to have a narrower meaning given to it—namely, dependency in relation to what is required to obtain the necessaries of life suitable for persons in the class and position of the family or persons who have suffered a loss by the accident.

In the present case the learned county court judge has come to the conclusion that there was a case of dependency proved, and it appears to me that there was evidence before him of that fact. It does not seem to me right to say that in a case, perhaps in all cases, where you can prove by the exact figure, as by the doing of the sum which Mr. Richardson suggested, and the result of which is to show that per head there is a larger sum for distribution than there was before

(1) [1900] A. C. 358, 362.

death, that in those cases there cannot be evidence of dependency. It seems to me that all the facts must be taken into account. A good illustration of that is to be found in *Tamworth Colliery Co.* v. *Hall* (1), where a boy not only contributed a certain sum a week, but also assisted his father, who was a barber, and it was held that that assistance must be taken into account, apart from a mere concrete valuation of the figures of the wages and the cost of maintenance of the deceased. Lord Loreburn said (2): "There is no rule of law that I know of to prevent the county court judge from looking at the whole of the facts, and there is no rule of law which says that the county court judge must so marshal the receipts and the outgoings as to set off the whole of the maintenance against the earnings and so negative the fact of dependency. He may say, if he thinks right and thinks it is the truth, that though the earnings were 6*s.* 11*d.* and the maintenance was 6*s.* 11*d.*, yet in return for the maintenance the deceased did service of value, so that the earnings were a clear gain, and that the applicant was dependent upon the earnings to the full extent or to any qualified extent. The proper course is to look at all the circumstances and to say to what extent, if at all, was the father dependent upon his son's earnings." I therefore desire to say that I do not accept that simple test which is suggested to us of the sum which per head would be received before and after death as a test which necessarily decides the question of dependency. I think all the facts must be looked at, and having regard to all the facts which were before the learned county court judge, it seems to me that he had material upon which he could decide that the father was a dependant.

It appears quite clear from *Roberts and Ruthven, Ld.* v. *Hall* (3) that the learned county court judge is entitled to act upon his general knowledge of the labour market and the conditions of the trade and so on, and, if he is entitled to apply his general knowledge of the labour market, it

(1) [1911] A. C. 665. (2) [1911] A. C. 669.
(3) 5 B. W. C. C. 331, 333.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Pollock M.R.

seems to me almost a fortiori he ought to be able to apply his knowledge of the conditions of life suitable for persons in the area in which he sits. Indeed, I think there are other cases, which I will not stop to refer to, which go even further than the passage to which I have referred from Lord Loreburn, which indicate that the learned county court judge has to apply his general knowledge. I say a fortiori because no person has so many cases dealing with the circumstances and necessaries of life before him as a county court judge, who has to deal with small debts and judgment summonses and the like, all giving him an insight and knowledge of the particular circumstances of the area. In my judgment the learned county court judge was entitled to apply his own knowledge, and he did apply his own knowledge to the figures, and took into consideration all the facts of the case, and he came to the conclusion that, having regard to all the facts, there was a case of dependency.

Then, having come to that conclusion, he takes into account what he is entitled to take into account—namely, the possibility of the increased value to the family of the deceased because of his prospective earnings. Warrington L.J. in giving his judgment in the Court of Appeal, in *Sheldon* v. *Butterley Co.* (1), says: "No hard and fast line can be drawn in such a case, capable of definite mathematical calculation, and if the judge has taken into consideration the fact that this boy's wages might have been increased, I am quite unable to say that it was unreasonable for him to do so." He is there quoting, with approval, the passage from *Rennoldson* v. *Ellerman Wilson Line* (2); and Duke L.J. (as he then was) said (3): "I see nothing in the Act to warrant the rejection of information or calculation with regard to his probable future earnings." It seems to me, therefore, that once dependency had been proved, the extent of the injury was not to be measured only by the immediate loss, but by the prospective loss which was involved in losing a son who, after all, is the hope and promise of the future.

(1) [1919] 2 K. B. 600, 604. (2) 11 B. W. C. C. 70, 72.
(3) [1919] 2 K. B. 600, 606.

It is said that the learned county court judge, even if that reading of the Act is right, has not so decided the case, and here I come to say a word or two about the judgment. It is often easy to make some meticulous criticism upon the judgment of the county court judge, who has a number of cases before him in succession. Although this judgment is one which was written after the day I think on which his decision was actually given, and, therefore, haste need not be attributed to it, still I think one ought to approach it from the point of view of trying to understand what the learned county court judge meant and intended to convey, rather than from that of a desire to be over critical. He divides his judgment into two portions, the first portion deals with the figures, and the second portion deals with what he understands is the law to be applied. He interprets the family purse to be the total wages and then, after dealing with the matter which I have indicated, he goes on to state: "The definition of partial dependency in s. 22 of the Act of 1923 is that which I have applied here. The deceased workman contributed to the 'family purse,' that is, he contributed to the provision of the ordinary necessaries of life of the family. The contribution was small, but this only affects the quantum of compensation, not the fact that there was a contribution, and therefore dependency." I think it is quite clear from the words there used that he had the actual terms of s. 22 clearly in mind and intended to interpret them with reference to and cutting them down to dependency in relation to the ordinary necessaries of life. Then he says that he applied his knowledge of life to the families in the county where this occurred, and he adds that he was satisfied that there was a balance from the deceased's wages after he was fed, and clothed, and he correctly interpreted or maintained the distinction between dependency and injury. It seems to me, therefore, that he has rightly directed himself, and if he has rightly directed himself, the matter is entirely a question for him as a question of fact. I think it would be unfortunate if it was open in these cases to come to the Court of Appeal on matters which are so difficult of definition

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Pollock M.R.

and of accurate calculation, because it must be for the learned county court judge, who has to deal with the facts and materials before him, to weigh and measure the facts; it is almost impossible for the Court of Appeal to do so. Moreover, I think it was the intention of the Act that this duty should be cast upon the learned county court judge.

For these reasons, I am of opinion that the criticism now suggested on the decision of the county court judge is not well founded, and that the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. In this case the learned judge has come to the conclusion that the father of a boy of fourteen, who was killed while working in the appellants' colliery, is to be treated as a partial dependant of the boy, and, therefore, entitled to compensation. The case has to be decided upon the original Act of 1906 as amended by the recent Act of 1923. The original Act defines "dependants" as being: "Such members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death," and "members of a family" to mean "wife or husband, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, granddaughter, step-son, step-daughter, brother, sister, half-brother, half-sister." That definition, which was hardly a definition at all, has now been supplemented by the provisions of s. 22 of the Act of 1923. [His Lordship read the section and continued:] That section enacts for the future the construction of the definition of the principal Act which was adopted by the members of the Court of Appeal in *Simmons* v. *White Bros.* (1) The best passage is in the judgment of Collins L.J., where he quotes the statement from Minton-Senhouse and Emery on Accidents to Workmen, p. 156, that "Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life," and accepts it as being correct. Now the question then is, was the learned county court judge justified

(1) [1899] 1 Q. B. 1005, 1007.

in coming to the conclusion in the present case that the father was partially dependent on contributions from his deceased son for the provision of the ordinary necessaries of life suitable for persons in his, the father's, class and position in life.

There are two questions on the construction of s. 22 which seem to me to be material and to require an answer. The first is: What is meant by the "ordinary necessaries of life suitable for the person?" whom I take to be the person alleging that he is a dependant. We are dealing with a case of a father now, and in the case of a father it seems to me that the ordinary necessaries of life are not confined to the necessaries of the father as an individual, that is John Smith or William Brown, or whatever his name is, but include the provision of ordinary necessaries of life for the family as a whole. On the other hand, upon the point which has been raised by Mr. Lowenthal, I see no sufficient ground for holding that the mere fact that a payment is being made by a son to a father, however small, that that is a contribution such as is there described in the Act of Parliament. It seems to me that you must for the purpose of interpreting this Act, or applying this Act, have regard to the expense incurred in maintaining the boy, and if that expense exceeds the amount received from the boy, then the boy is not making a contribution to the ordinary necessaries of life referred to in the section; he is only paying partially for the necessaries required for the maintenance of the boy himself. That view is borne out by a passage in the judgment of Lord Loreburn in *Tamworth Colliery Co.* v. *Hall* (1), in which, dealing with the suggestion that the learned judge ought to have excluded from his consideration the cost of the maintenance of the son, he says: "In my opinion it is not right to say that the county court judge must exclude the cost of the maintenance of the son. He is quite entitled to say that the father is not dependent at all because he is not in a situation to gain anything from the earnings of the son. The learned county court judge would be entitled to say if he thought it were a

(1) [1911] A. C. 665, 669.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Warrington L.J.

fact that the earnings of the son were 6*s.* 11*d.* and that he cost his father at least 6*s.* 11*d.* to keep. If *Osmond* v. *Campbell and Harrison, Ld.* (1), to which reference was made, means anything contrary to this, then I dissent from it. Accordingly, if this were the only point, I should say that the county court judge was entitled to find that there was no dependency at all, inasmuch as the cost of the maintenance of the son was as much as the wages which he gave to the father."

In the present case the county court judge has arrived at the conclusion at which, on the whole, I think he was entitled to arrive, by applying his own personal knowledge of the conditions in the district; he arrived at the conclusion that the sum of 15*s.* 3*d.* which the boy contributed to the joint expenses of the household exceeded that which was necessary for his own personal maintenance, and there was, therefore, a contribution to what the learned judge calls the "family purse"; that, however, may not be enough, because the amount of the family purse might, in certain cases, be so great that the small contribution which the boy makes to it could not be said to be a contribution for the provision of the ordinary necessaries of life, but that is not the case here.

The first question the Court has to consider is: Did the learned judge put to himself the proper question? and the proper question here which he had to put to himself was, "Has the applicant satisfied the requirements of s. 22 according to its true construction?" With regard to that he says: "The definition of partial dependency in s. 22 of the Act of 1923 is that which I have applied here. The deceased workman contributed to the 'family purse,' that is, he contributed to 'the provision of the ordinary necessaries of life' of the family." He shows, therefore, that he considers what he had to decide was whether the boy contributed to the provision of the ordinary necessaries of life of the family, and that, I think, was the real question which he had to consider. Then he finds as a fact, as I have already pointed out: "But from my knowledge of the life in miners' families in Durham and Yorkshire derived from many hundreds of arbitrations and

(1) [1905] 2 K. B. 852.

orders for the disposition of compensation amongst miners' dependants, I am satisfied that there was a balance from deceased's wages after he was fed and clothed, that, in fact, there was a contribution left for the 'family purse.' "

In my opinion there was evidence before him upon the admitted facts upon which, supplemented by his own knowledge of life and his own common sense, he could say that there was, after feeding and clothing the boy, sufficient actual contribution to the provision for the ordinary necessaries of life of this family. I think there was evidence here on which he could come to that conclusion. That being so, therefore, it would be impossible for us to upset this finding on what was a mere question of fact. Then, having found that the father was a partial dependant, the learned county court judge was entitled to do what he has done and take into account the possibility of the future earnings of the boy in determining what was a reasonable sum to allow for compensation proportionate to the injury suffered by the father. In doing that he arrived at a sum of 50*l*., and there was really no argument on that question or anything to show that that sum was excessive.

On the whole, therefore, I think that the learned county court judge arrived at an award which we are certainly not in a position to set aside. The appeal must be dismissed.

SCRUTTON L.J. This case involves the question whether, when a young boy, a member of a family, had died who had been contributing part of his wages to the family purse you could say that the father, mother, elder brother and sister and younger brother and sister of the dead boy were his dependants and were entitled to compensation for his death from the employer. I think it is quite clear that that question, if the learned judge properly directs himself, is a question of fact upon which this Court will be very slow to interfere with his decision. The idea of continual appeals on the question of amount in cases of death is one which one can only contemplate with a shudder, and as far as I am personally concerned, I am disposed to be very

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Scrutton L.J.

slow to interfere with the judgment of a county court judge in these matters of dependency unless I am clearly satisfied that he has misdirected himself in point of law, or has utterly failed to consider some vitally important fact. The help one gets from the statute upon the question is this: s. 13 defines "dependants" to mean "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death," and then there is the further provision in Sch. I., para. 1 (*a*) (ii), as to partial dependency—that if there are partial dependants the amount of compensation "is to be reasonable and proportionate to the injury to the said dependants." That does not carry us very far.

In 1899 the Court of Appeal in *Simmons* v. *White Bros.* (1) were disposed to view with approval a definition in an existing text-book (Minton-Senhouse and Emery on Accidents to Workmen, p. 156), that "Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life" which involved taking into consideration not only the actual expenditure of that family but in addition the question how far that expenditure was in accordance with the ordinary expenditure of persons in that class of life. Shortly after that, in *Main Colliery Co.* v. *Davies* (2) (which I see was argued before six Law Lords by three counsel on each side, and therefore I suppose it was considered a test case of some importance), Lord Halsbury, with whom at least four of the Law Lords agreed, expressed himself with great vigour, as he usually did, that the introduction of the ordinary standard of life was one which the Legislature had never contemplated. He said (3): "I am quite certain that no human intellect would be able to ascertain exactly what the standard was if one had to deal with such a question —a standard dependent upon what was the ordinary course of expenditure in the neighbourhood and in the class in which the man lived." He was disposed to think that the only thing you were to look at was, "What the family was in fact

(1) [1899] 1 Q. B. 1005. (2) [1900] A. C. 358.
(3) [1900] A. C. 362.

earning, what the family was in fact spending?" That being the law as laid down by the House of Lords in 1900, in 1923 Parliament, for some reason which I do not understand, appeared to have put back, or rather to have introduced into the statute, the very measure which Lord Halsbury said was perfectly impossible in the *Main Colliery Co.* case (1): "A person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." The effect of that seems to be to restore the rule which the Court of Appeal were disposed to adopt in *Simmons* v. *White Bros.* (2), and which the House of Lords seem to have rejected in the *Main Colliery Co.* case. (1) Now in my view the proper direction for a county court judge is that he has to consider whether at the time of the death the alleged dependant was receiving a net balance of advantage from the deceased's contribution, that is to say, in the case of a father and son, whether after defraying the expense of maintaining the son the father had a balance of the contribution available for the provision of ordinary necessaries of life for himself and the rest of the family. That direction, which I think is the right one, is contrary to the suggestion which was hinted at by Mr. Lowenthal, to this effect, that the true view is that if the father is under a liability to maintain the son, any contribution, however small, which the son makes to relieve that liability of the father constitutes the father a dependant of the son to the extent of that contribution, and he says no doubt the son is also dependent on the father for the expenses of maintenance. He quite faced the position that in his view you might have A. a dependant of B., and at the same time B. a dependant of A., which startled me. Mr. Lowenthal said, Why? and it startled me, because I cannot conceive of two persons each the dependant of the other at the same time. It sounds such a topsy-turvy use of language: if A. depends on B. how can B. depend on A., and also, quite apart from being startled at the use of language, it appears to

(1) [1900] A. C. 358. (2) [1899] 1 Q. B. 1005.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Scrutton L.J.

me that the language of s. 22 does not fit in at all with Mr. Lowenthal's argument. The section says: "A person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." Applying that to the father's case it appears to me to read: "The father shall not be deemed to be a partial dependant of the son unless the father was dependent partially on contributions from the son for the provision of the ordinary necessaries of life suitable for persons in the father's class and position," and I do not feel able to read that language as covering the father's liability to maintain the son with the ordinary necessaries of life suitable for a person in the father's class and position. It appears to me the language of s. 22 is quite inapplicable to the argument suggested by Mr. Lowenthal.

Now applying that direction, if that is the proper direction, to what happened in this case, there was a family with a total income, including the free house and coals, of 5*l.* 11*s.* 9*d.* a week. There was included in that family, a father, a mother and a young brother, a boy of fourteen, who was earning 15*s.* 3*d.* a week and who paid it to his father. The county court judge has considered the ordinary necessaries of life of the family and has found that there was a balance from the son's wages after he was fed and clothed; in fact, that there was a contribution left for the family purse, and, therefore, a basis for compensation. It is said by Mr. Neilson that there was no evidence on which he could find that, and indeed that the facts stated show that he ought to have found the other way. That apparently was rested on two arguments. The first was that if you divide the income of the five before the death and divide the income of the four after the death, the four will have a larger average income than the five, therefore it cannot be said that they have suffered any loss. As a process of arithmetic that is quite accurate, as a process of logic it appears to me to have nothing whatever to do with the question, because it appears to assume

that all these five members cost the same, whereas it will be fairly obvious that the youngest son of eleven did not cost as much as the mother of thirty-nine. If that were so in every case in which the workman who died was a young boy earning a small income you would have to say there is no loss whatever, because the arithmetical process would always come out in that way. But it also rests on this, as I think, that the county court judge has applied his knowledge of the life in miners' families in Durham and Yorkshire derived from many hundreds of arbitrations and orders for the disposition of compensation amongst miners' dependants, and, says Mr. Neilson, the county court judge must not use his own knowledge; he must act on evidence; and in every case of a dependant asking for compensation on the ground of dependency there must be evidence of the actual cost of living, and of the ordinary habits of workmen in that part. I hope that is not true, it would enormously increase the expense and the time taken in settling these questions of compensation. The county court judge in the statute is stated to be an arbitrator. One distinguished county court judge has carried that so far in the south of England as to say that he will not pay any attention to the decisions of the Court of Appeal because he is an arbitrator, and that an arbitrator need not bother about reported decisions. Without going as far as that distinguished judge does, I think that the decisions of this Court have certainly gone as far as this, that the county court judge, acting as an arbitrator and sitting in a district where he is very familiar with labour conditions, may use his own knowledge as to the probable wages, probable employment for like work, and conditions of labour; he may do that because he is continually conversant with them by his position as a county court judge, and because it would be a denial of justice to require these facts to be continually proved. Fletcher Moulton L.J. put the matter, I think, in the most forcible way in *Roberts and Ruthven, Ld.* v. *Hall*(1), where he said: "It would be a calamity if it was decided that the judge could act upon no evidence except definite evidence

(1) 5 B. W. C. C. 331, 333.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & CO.

Scrutton L.J.

as to the amount the man is able to earn at particular work and the probability of obtaining that particular work. Cases would go on to such a length and would require so much evidence, and instead of this being a beneficial jurisdiction it would be onerous to both parties. The Act distinctly contemplates and enjoins that the judge should use his good sense in the same way as would members of a jury." When Lord Sterndale adopted that view in *Lock* v. *Chatham Education Committee* (1) he said: "But we have the authority of this Court to say that an arbitrator or county court judge, in a case of this kind, is entitled to apply his own knowledge of the general state of the labour market and local conditions." Now if there is a matter with which the county court judge is thoroughly familiar in administering the Employers Liability Act, 1880, it is the average cost of living in the district. He is continually having to deal with questions of this kind: a father dies and 300*l.* is paid into Court, the mother comes to the Court and says: Here are three children aged respectively eleven, nine, and seventeen, make me an allowance out of the 300*l.* for the cost of maintaining those children. He is having that sort of question every day, and to say in cases like that, he must have evidence in each case establishing what is the cost of keeping a child, and what is the ordinary cost of maintenance of a family in that district, would be enormously to lengthen county court proceedings. A certain amount of trust has to be reposed in a county court judge who has this amount of experience, and in my view the county court judge in this case was justified in referring to his own knowledge of the cost of maintaining a boy of fifteen in a miner's family. That being so, it seems to me there was abundant evidence on which he could, if he liked, find that 15*s.* 3*d.* a week, after deducting the cost of keeping the boy, would leave a balance which would go to the father. Whether we should have found the same is immaterial; we have not the same knowledge as he has; but there was evidence on which he could make the finding. It is a question of fact from which there is no appeal from him, and therefore the

(1) (1922) 15 B. W. C. C. 35, 37.

appeal must be dismissed, there being evidence on which the county court judge could come to the conclusion at which he arrived.

C. A. 1924

PEART v. BOLCKOW, VAUGHAN & Co.

Scrutton L.J.

Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

Solicitors for respondent: *Hyman Isaacs, Lewis & Mills, for H. F. Heath, Sunderland.*

W. I. C.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1924 *June* 24, 25. C. A. *Nov.* 6, 7.

ATHERTON (INSPECTOR OF TAXES) *v.* BRITISH INSULATED AND HELSBY CABLES, LIMITED.

Revenue—Income Tax—Sch. D—Trade Profits—Deductions—Lump Sum set aside out of Profits to establish Pension Fund for Employees—Sum ascertained by actuarial Calculation—Trust Deed—"Money wholly and exclusively laid out for the purposes of the trade"—"Capital withdrawn from, or any sum employed . . . . as capital in such trade"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 3 (*a*) *and* (*f*).

A company carried on business as manufacturers of insulated cables. In August, 1916, a Pension Fund was constituted by the company for the benefit of its employees. Under this scheme each member undertook to contribute 5 per cent. of his salary from March 31, 1916, and the company contributed an amount equivalent to one-half of the contributions of the members. As the scheme was a new one, and it was desired that employees who had attained the age of 65 should rank for pension at once, the company also contributed a sum of 31,784*l.* to the Fund, that being the actuarial sum necessary to provide such pensions before the scheme became self-supporting. The benefits of the scheme included a pension upon retirement at the age of 65, and, in other cases, a return of the members' contributions with interest. In computing its profits for the purpose of assessment to income tax for the year ending April 5, 1918, the company claimed to deduct the 31,784*l.* The Commissioners allowed the deduction on appeal, and it was held by Rowlatt J., following *Hancock* v. *General Reversionary and Investment Co.* [1919] 1 K. B. 25, by which he considered himself bound, that the sum of 31,784*l.* was an admissible deduction in computing the profits of the company:—

Held, by the Court of Appeal, reversing the decision of Rowlatt J., that the sum of 31,784*l.* was not money wholly and exclusively laid out

1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

for the purposes of the trade under r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, and was not therefore an admissible deduction for purposes of income tax, but that the sum was capital withdrawn from the trade, and therefore not deductible under r. 3 (*f*) of the same Rules.

Hancock v. *General Reversionary and Investment Co.* [1919] 1 K. B. 25 distinguished.

Rowntree & Co. v. *Curtis*, ante, p. 328 followed.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners held on February 24, 1922, for the purpose of hearing appeals, the British Insulated and Helsby Cables, Ld. (hereinafter called "the company"), appealed against an assessment to income tax in the sum of 250,000*l.* for the year ending April 5, 1918, made upon it under the Income Tax Act, 1918, in respect of the profits of its business.

2. The sole question which was before the Commissioners on the appeal and on which the opinion of the Court was sought was whether a contribution of 31,784*l.* made by the company in the circumstances detailed below to a Pension Fund established for the benefit of its clerical and technical salaried staff was an admissible deduction in computing its profits for the purpose of assessment to income tax for the year in question.

3. The company carried on business as manufacturers of insulated cables. Its issued capital at December 31, 1916, consisted of 500,000 1*l.* ordinary shares and 500,000 1*l.* preference shares, and in addition it had issued 750,000*l.* debenture stock. The profits of the company for the five years to December 31, 1920, as shown on the respective balance sheets, had been approximately as follows:—

For the year to December 31,			1916	.. 306,000*l.*
,,	,,	,,	1917	.. 363,000*l.*
,,	,,	,,	1918	.. 288,000*l.*
,,	,,	,,	1919	.. 328,000*l.*
,,	,,	,,	1920	.. 340,000*l.*

4. In addition to its wages staff the company had a clerical

and technical salaried staff of about 500, of whom approximately 300 were eligible to participate in the Fund. Before the year 1916 the company had not paid pensions to employees retiring on account of old age. It found, however, that it frequently lost experienced members of its salaried staff, who left to take up appointments elsewhere, and that the absence of a regular system of pensions was injurious to its business in other respects. It was therefore decided to establish under the powers given to the company by its memorandum of association a Pension Fund for its clerical and technical salaried staff, in the hope that the benefits to be derived from the Fund would induce the members of its staff to remain in its service, and otherwise increase the efficiency of the company's staff.

5. A Pension Fund was accordingly constituted by a trust deed dated August 8, 1916. The deed contained the following provisions (inter alia) :—

Contributions by the Staff.—Each member of the existing staff who elected to join the Fund undertook to contribute 5 per cent. of his salary to the Fund as from March 31, 1916. The older members of the staff were not called upon to pay any higher rate of contribution on account of their age.

Persons joining the staff after the commencement of the Fund were also to contribute at the rate of 5 per cent. of their salary, if not above the age of 40 at the time of joining the Fund. If above the age of 40, the rate of contribution was increased according to the age at the time of joining.

Contributions by the Company.—The company undertook to contribute to the Fund an amount equivalent to one-half of the contributions of the members. In addition it undertook to pay the sum of 31,784*l.* (the item giving rise to the appeal in this case) to form the nucleus of the Fund, and to provide the capital sum necessary in order that past years of service of the then existing staff should rank for pension. The company also undertook to make up the income from the invested funds to a net income equal to the rate of 4 per cent. per annum, free of tax, on the amount of the accumulated funds.

1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Investment of Pension Fund.—All money in the hands of the trustees and the income thereof not for the time being required for making of the payments specified in the said trust deed were to be invested upon such securities and in such manner as the trustees should think fit.

Benefits and Application of Fund.—The benefits took the form : (*a*) in the event of retirement at the age of 65 and in certain other circumstances of a pension depending on the length of service, and (*b*) in other cases of a return of the member's contributions with interest.

The trustees of the Fund had power to apply the income and also as far as necessary the capital of the Fund in payment of the benefits provided.

Appointment of Trustees.—Two of the trustees of the Fund were appointed by the directors of the company while the three other trustees (called " staff trustees ") must be contributing members of the Fund and were appointed by the remaining or continuing staff trustees. The majority therefore of the trustees, with whom the administration of the Fund rested, were representatives of the members of the Fund, and the actual management of the Fund was left to the staff trustees, the directors' trustees advising only with regard to investments.

Disposition of Fund on Winding Up.—In the event of the winding up of the Fund the whole of the amount was to be divided among the members, and the company would not recover any part of the contributions which it had paid.

6. On behalf of the company it was contended (1.) that the payment of pensions by the company to its employees was an ordinary business expense and a continuous business demand ; (2.) that in determining the admissibility of the deduction it it was immaterial whether payment of a pension was made to the pensioner as it fell due, or whether a payment was made of a lump sum to relieve the employer of a future liability on a pension already payable, as in *Hancock* v. *General Reversionary and Investment Co.* (1), or whether payment was made irrevocably by the employer to trustees to meet the liability

(1) [1919] 1 K. B. 25.

for pensions which would only commence at a future date; (3.) that the company parted with the sum of 31,784*l.* irrevocably, and this sum was not represented by any asset of the company, and (4.) that this sum should be allowed as a deduction in computing the company's profits for the purposes of income tax.

The following cases were also referred to: *Usher's Wiltshire Brewery* v. *Bruce* (1); *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (2); *Ounsworth* v. *Vickers, Ltd.* (3)

7. On behalf of the Crown it was contended (inter alia): (1.) that the sum of 31,784*l.* was not money wholly and exclusively laid out for the purposes of the trade under r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D, and therefore was not an admissible deduction from the profits for the purposes of income tax; and (2.) that this sum was capital withdrawn from the trade, and therefore not deductible from profits under r. 3 (*f*) of the Rules applicable to Cases I. and II. of Sch. D.

8. The Commissioners held that in view of the decision in *Hancock* v. *General Reversionary and Investment Co.* (4) the contribution of 31,784*l.* was an admissible deduction in computing the profits of the company for the purposes of the Income Tax Acts, and the figures having been agreed between the parties they reduced the assessment to the sum of 275,736*l.*, less 33,210*l.* wear and tear allowance.

The Crown appealed. The appeal was heard before Rowlatt J. on June 24 and 25, 1924.

Sir Patrick Hastings A.-G. and *R. P. Hills* for the appellant.
Latter K.C. and *Hildesley* for the respondents.

ROWLATT J. In this case the respondent company thought it wise, in order to attract and retain a good class of servant, to inaugurate a system of pensions. The scheme was, in principle, that the necessary Fund should be created by a payment of 5 per cent. on their wages by the

(1) [1915] A. C. 433.
(2) [1914] 3 K. B. 674.
(3) [1915] 3 K. B. 267.
(4) [1919] 1 K. B. 25.

1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Rowlatt J.

employees and half that amount by the company, and if the scheme could have commenced with new and young employees those sums would have been sufficient to maintain the Fund in a solvent condition when it became established in the future and these sums had been paid in respect of everybody throughout their employment. It was however desired that this system of pensions should start at once. That meant that there would be a claim upon the Fund in respect of persons who had already been long in the employment of the company and in respect of whom no payments had been made. Therefore a lump sum had to be found to initiate the Fund and make it solvent in respect of that source of deficiency, and that sum of 31,784*l.* was found by the respondent company, which sum they seek to deduct against the profits of the year in which they found it. That sum is not a sum which would produce by way of interest enough to make good the deficiency of income of the Fund, owing to the claims upon it of these older employees, but it was an actuarial sum which, taking the principal and interest together, would cover the claims in question and would (to put it briefly) redeem them in advance. When these older employees had all drawn their pensions and died, according to the actuarial calculation, if it proved to be exactly borne out by the facts, this sum would have disappeared, capital and income.

If the company had started to pay these pensions and had paid them year by year, it is not disputed that those payments would be a business expense, sums laid out for the purposes of the business, according to the Act, and year by year those annual sums would be deductible. The question is whether a lump sum of the kind which I have described, paid at the beginning to prevent these sums having to be paid later, can be deducted.

It is clear that expenditure which in its nature is a revenue expenditure, does not cease to be deductible because it is not made annually. In the course of the argument reference was made by way of illustration to *Ounsworth* v. *Vickers* (1), which

(1) [1915] 3 K. B. 267.

came before me for decision in 1915. In that case Messrs. Vickers had expended a large sum in 1912 upon dredging and constructing a deep water berth for the purpose of their works, and claimed to deduct this before ascertaining their taxable profits. It was conceded that dredging a water passage which is continually silting up is an income expense to be faced by the persons who own the passage, and it does not cease to be deductible, because, instead of continuously dredging, or dredging every year, they may dredge very efficiently in one year and thereby save themselves from having to dredge in the next two years. It still is an income charge. On the other hand, if the undertakers in possession of a channel of that kind were minded, by concreting the bottom of their water passage, to make it a channel which never required dredging and so save themselves from that expense until the concreting wore out, I apprehend it would not be argued that that was an income expenditure. It would be said that that was providing themselves, by a capital expenditure, with a better sort of channel that had not the disadvantage that it required dredging from time to time.

The question in this case is whether, when, in order to get rid of annual payments such as pensions, you invest an actuarial sum to free your undertaking from a liability for a term of years uncertain, that can be treated as a payment in one year on the same footing as the annual payments would have stood if they had been made annually. I confess that I think this a matter of very considerable difficulty, and had it not been for *Hancock's* case (1), the principle of which was accepted apparently without misgiving in the Court of Appeal, I do not know whether I should have been able to come to that decision. But it seems to me that *Hancock's* case (1) governs the present one when once it is realized that this is an actuarial sum preventing those payments from arising and that the annual payments would themselves have been deductible.

The Attorney-General sought to distinguish *Hancock's* case (1) in this way. He said that in *Hancock's* case (1) the

(1) [1919] 1 K. B. 25.

1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Rowlatt J.

pension was already de facto being paid, and that this was redeeming it, whereas in the present case the pension scheme was still in futuro, and this payment was made to prevent the annual payments having to be made in the future. I do not think I ought to apply a distinction of that kind, because it does not seem to me to be a distinction of principle. If they had gone into this pension scheme for a year or two on the principle of making payments and then had changed their minds and had said : " We will buy from a life assurance company an indemnity against these payments for the future, or we will put up the money into the Fund ourselves on an actuarial basis," which is the same thing, I do not see how it would have been possible to distinguish *Hancock's* case. (1) I think if I distinguished *Hancock's* case (1) merely upon the ground that they adopted this policy from the beginning of the scheme instead of afterwards, I should be giving effect to a distinction without a difference.

Under these circumstances I think this appeal fails and must be dismissed with costs.

F. P. F.

C. A.

The Crown appealed. The appeal was heard on November 6 and 7, 1924.

Sir Patrick Hastings K.C. and *R. P. Hills* for the Crown.
Latter K.C. and *Hildesley* for the respondent company.

POLLOCK M.R. This is an appeal from a decision of Rowlatt J., who gave judgment for the company on June 25, 1924. From that decision the Crown appeals and claims that a certain sum—namely, 31,784*l.*—is a sum which ought not to be deducted by the company as a part of the cost of carrying on its business for the purpose of ascertaining what are its profits and gains subject to income tax.

Now the facts may be recapitulated quite shortly. The British Insulated and Helsby Cables Co. is a large and important company carrying on business and having, in addition to a working staff, what is called a clerical and

(1) [1919] 1 K. B. 25.

technical salaried staff. In the year 1916 it was minded to establish a Pension Fund. The Pension Fund was started on this principle, that the staff were to contribute a certain amount, and the company was to contribute one-half of the amount contributed by the staff. It is stated in para. 5 of the case that each member of the existing staff, who elected to join the Fund, undertook to contribute 5 per cent. of his salary to the Fund as from March 31, 1916, and that the older members of the staff were not called upon to pay any higher rate of contribution on account of their age. Then persons joining the staff after the commencement of the Fund were also to contribute at the rate of 5 per cent. of their salary if not above the age of 40 at the time of joining the Fund. If they joined it above the age of 40 the rate was increased. That system obviously entailed this difficulty, that inasmuch as the existing members of the staff, whatever might be their ages, were not required to contribute any larger sums than the incoming and presumably younger members, it would not be possible actuarially to give as great a benefit in the matter of pensions to the older members of the staff as to the younger members of the staff; or, putting it in other words, it was quite obvious that the older members of the staff, contributing the same as the younger members, would necessarily have to be content with decreased benefits. The company thought that would be unfortunate. It was afraid that if that were so that the older staff might seek, if they could, to obtain employment elsewhere, and it was therefore minded to put the whole staff on the same footing, whether they were older or whether they were younger; in other words, the company wanted to see that the benefits granted, whatever might be the age of those who were contributing to the Fund, should be the same. It thereupon had calculations made by an actuary, and it was ascertained that the deficiency as shown on the existing system, if all the employees, whatever their age, were to be given similar benefits, would be 31,784*l*. The company has contributed that sum to the Pension Fund, and it now asks to be allowed to deduct it as a sum which has been wholly

C. A. 1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Pollock M.R.

and exclusively laid out and expended for the purposes of the trade and so deductible under r. 3 of Cases I. and II. of Sch. D. The Commissioners came to the conclusion, on the authority of *Hancock* v. *General Reversionary and Investment Co.* (1), that this contribution was an admissible deduction in computing the profits of the company for the purpose of the Income Tax Acts; and Rowlatt J., although he seems, in his judgment, to have had some doubt whether or not he would have come to that conclusion, thought that the principle of *Hancock's* case (1) was such that he acquiesced in, if he did not indorse, the decision of the Commissioners.

We have to determine whether or not this is a proper deduction. I say at once that it is a difficult case, because the line is not easy to draw between what is a deduction allowable in ascertaining the profits and gains of a company and what is to be attributed to capital expenditure. A number of cases have been cited to us as illustrations rather than as guides; and we have to make up our minds on which side of the line the present case falls. It is to be observed that r. 3 tells us how the amount of the profits and gains is to be computed. It begins by saying that no sum is to be deducted in respect of any disbursements, not being money wholly and exclusively laid out or expended for the purposes of the trade. Therefore, unless this money, the 31,784*l.*, was wholly and exclusively laid out for the purposes of the trade it could not be deducted. It is pointed out that the disbursement in this case has many of the characteristics which are to be found in the cases where deductions have been held to be justified. It is made for the purpose of ensuring a good, efficient, and contented staff. It is made in order that the position of the staff may be improved in the future. It is said it is a payment made to-day in order that benefits might thereby accrue in the future, and, therefore, that it has been, as many other deductions which have been allowed have been, wholly and exclusively made or expended for the purposes of the trade. I am content that it should be so treated. Unless it were so treated the question could not arise, but when it

(1) [1919] 1 K. B. 25.

has been treated as so "wholly and exclusively made or expended" we then have to decide whether or not it falls within cl. (*f*) of r. 3, which provides that no sum shall be deducted in respect of "any sum employed or intended to be employed as capital in such trade."

Now the question what is attributable to capital and what to revenue account is a question puzzling to many. I doubt whether it is possible to lay down any satisfactory definition. We had to consider the question in *Rowntree's* case (1), a case in which a large sum of capital had been provided by Rowntree & Co., the income of which was to be applied to what was called the "invalidity" of their workmen. Having considered the cases very carefully, we decided that that deduction could not be allowed. First of all, treating this as being an expenditure prudent and useful for the purposes of the trade and so having some of the characteristics which would prima facie justify its deduction under r. 3, cl. (*a*), that does not conclude the question. We have to consider whether or not it is an item employed and intended to be employed as capital in such trade. For my part I think it would be very difficult to say that this contribution, which is not essential, although satisfactory, from the employees' point of view, could be treated simply as a revenue item. I do not think that it would have been provided unless the company had been in such a condition that it would be possible from its existing assets to provide it. The homely phrase, unless the company had had the money to do it, it would not have done it, I think applies in this sense, that having the money the company was prepared to make use of a certain amount of capital in giving this satisfactory benefit to its employees. If it had not had the money to do it it would not necessarily, or indeed at all, have made this expenditure, still less would it have charged it on ordinary principles to the revenue account. Asking myself the question in that form I say: Would any one at the present time have treated this as a necessary expenditure in seeking profits and gains; or would he say: "Well, if you have the money to do it, it will be

(1) Ante, p. 328.

C. A. 1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Pollock M.R.

a satisfactory use of the money if it is possible for you to provide it." It seems to me, upon the facts as found, that it ought to be treated as being a sum employed as capital in such trade.

It is said that *Hancock's* case (1) points in a different direction. I have said what I had to say about *Hancock's* case (1) in *Rowntree's* case. (2) All that I will add here is, that I think it is a case which depends upon its facts. I doubt whether, although the question of the payment in that case being a capital expenditure was argued, full attention was given to that question in the judgment. In *Hancock's* case (1) there was an existing liability, a sum which had to be paid year by year, and it may well have been good business to have paid or provided a lump sum in order to get rid of that accruing and continuing yearly liability. The case is not the same here. There was no liability in law. This is an expenditure similar to one which might improve the plant, or make the plant more easy to work, although it would not actually increase the output.

It is said that the question of whether it is a legal liability or not, does not determine the matter, because it was decided by the House of Lords in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (3), that where you have an outlay made for the purposes of business, it being an item which the directors might legitimately incur in their prudent and perhaps generous estimation of how business ought to be carried on, then you may deduct such outlay as an expense for seeking profits. Of course *Usher's Brewery* case (3) is binding upon us, and I desire to point out that both in *Rowntree's* case (2) and again here I should wish to conform to what Lord Parker and Lord Sumner have said about the area of revenue expenditure and capital expenditure. But I should like also to point out that in *Usher's Brewery* case (4) there was a supplementary statement, which contained the following: "The cost [of repairs] is incurred not as a matter of charity but of commercial expediency and is necessary in order to avoid the loss

(1) [1919] 1 K. B. 25.
(2) Ante, p. 328.
(3) [1915] A. C. 433.
(4) [1915] A. C. 433, 436.

of tenants and consequent transfers to which the licensing justices object"; and it will be found that the reference to the expenditure being necessary is referred to and repeated in a number of the speeches made. Lord Atkinson refers to it (1), and Lord Parker says (2): "The better view, however, appears to be that, where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed." He refers to it again later in his speech. (3) It seems to me, therefore, that you have to remember that in *Usher's Brewery* case (1) there had been that finding, that the expenditure was necessary in order to secure the gains and profits. Here, as I pointed out, there was no liability, and the Commissioners only find that it is admissible in accordance with the ruling or principle, as they understand it, of *Hancock's* case (4), and I do not think that what the Commissioners have found here is sufficient or is parallel to what was found in *Usher's Brewery* case. (5) They have only held it to be an admissible deduction; they have not said that it was a necessary deduction. The facts to my mind would not justify them in so finding.

It appears to me that when you consider what is the purpose of this payment, the right attribute to apply to it is that it was a payment made as a capital outlay and that it cannot be deducted from the revenue as a payment made in the course of seeking profits and gains.

It appears to me, therefore, for these reasons that the right course is to allow the appeal, and to allow it with costs.

WARRINGTON L.J. The question in this case is whether a contribution of 31,784*l.* made by the company to a Pension Fund established for the benefit of its clerical and technical salaried staff is an admissible deduction in computing its profits for the purpose of assessment to income tax for the year in question, the year in question being the year ending April 5, 1918. Whether or not deductions are to be allowed

(1) [1915] A. C. 433, 451.
(2) Ibid. 458.
(3) [1915] A. C. 462.
(4) [1919] 1 K. B. 25.
(5) [1915] A. C. 433.

C. A. 1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Warrington L.J.

for the purpose of ascertaining the net income for the purposes of income tax is a question of considerable difficulty, and for this reason, that whereas the Income Tax Act, 1918, enacts that in arriving at the amount of profits and gains for the purpose of income tax no other deductions shall be made than such as are expressly enumerated in this Act, the Act does not in fact enumerate any deductions at all, except those which are not to be made. The meaning and effect of that curious structure of the Act was considered both by Lord Parker and by Lord Sumner in *Usher's Wiltshire Brewery* v. *Bruce*. (1) The passage in Lord Sumner's speech (2) I will read: "The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according to it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." The Rules applicable to Cases I. and II. of Sch. D provide (r. 3) that "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation." That is a prohibition. Such a payment as that in question may, in my opinion, upon the authorities, be taken to have been wholly and exclusively laid out or expended for the purposes of the company's trade (and that I think is not disputed by the Attorney-General), and for this reason, that to provide for pensions to its officers and servants is generally, and may be universally, for the benefit of a company as a trader, as enabling it to be better served by its officers and servants and to get a better class of men to serve it; but though you may arrive at that, that is to say, that the deduction is not prohibited by r. 3 (*a*),

(1) [1915] A. C. 433. (2) Ibid. 468.

yet still it is not to be allowed unless, to use again the words of Lord Sumner, it is, "on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." To my mind the real question that we have to determine is not whether this is prohibited by r. 3, cl. (*a*), or whether it is prohibited by r. 3, cl. (*f*), which prohibits the deduction of "any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation." The real question I think which we have to determine is whether this is a proper debit item to be charged against the incomings of the trade when computing the balance of profits of it; that is to say, to put it in a shorter form, is it a payment which can rightly be charged against the incomings of the trade for the purpose of computing the balance of profits of it?

The circumstances under which this particular payment was made can be very shortly stated. The company was desirous of establishing a Pension Fund and the Pension Fund was to be made up by contributions from the officers and servants of the staff—it was a superior staff, if I may so call it—and by a contribution by the company of one-half of the contributions of the members of the staff; that is to say, the staff were to contribute 5 per cent. of their salaries, and the company was to contribute $2\frac{1}{2}$ per cent. of, I suppose, the total amount of the salaries. But the Fund was to be started at a time when there were already in the service of the company a number of officers and servants of mature years who had been many years in the company's service; and inasmuch as the benefit which these officers and servants were to take was this, that in the event of retirement at the age of 65 and in certain other events they were to be entitled to pensions depending on length of service, it is obvious that the contributions of the actual officers and servants at the time and the contributions of the company would, in the ordinary and natural course of events, not be enough to render the Fund solvent, but the Fund would be exhausted in payment of the first few pensions that became

C. A. 1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Warrington L.J.

payable, and would cease to be solvent, and, therefore, there would be no pensions available out of it for the younger members of the staff when they became entitled to them. Accordingly the company had an actuarial calculation made of the capital sum necessary to be contributed to the Fund in order to render it solvent and thus to meet the peculiar difficulty which had arisen. That calculation resulted in the actuary reporting that a sum of 31,784*l.* was required to make up the deficiency. That is the sum which is now in question, and which was paid by the company to trustees under the trust deed of the Fund, and, as the Commissioners find, to provide the capital necessary in order that past years of service of the then existing staff should rank for pension. That is the object of the payment as found by the Commissioners. Was that a payment properly deducted for the purposes of income tax? In my opinion it was not. I am not saying for the moment whether a recurring payment may or may not be redeemed by a capital payment and that capital payment allowed in lieu of the recurring income payments. I assume for the moment that that is so, but in this case the payment made by the company was not of that nature. The company never undertook and it never intended to undertake to pay out of its current income pensions to its servants. What it did intend to do was to establish a Pension Fund made up of contributions by itself and by the servants themselves, out of which the pensions should be paid. It did not undertake to make, and it never contemplated making itself, the periodical payments which had to be made towards these pensions. What the company did do was this: Realizing that for the first few years, at all events, it would be impossible to pay the full pensions to its older servants without rendering the Fund insolvent, it made the Fund solvent by contributing this money. It seems to me that that stands on an altogether different footing from that of a payment made by a person who is under an obligation legally or morally to make an annual payment and who redeems that annual payment by making a payment once and for all. It seems to me that this is a payment which was in every

sense a payment made once and for all, and not a recurring or in the nature of a recurring payment, so as to come within the definition given by Lord Dunedin in *Vallambrosa Rubber Co.* v. *Farmer* (1) or any similar definition.

I think it is plain from his judgment that Rowlatt J. would have arrived at the conclusion which I have already expressed if he had not considered himself bound by the decision of Lush J. in *Hancock* v. *General Reversionary and Investment Co.* (2) With all respect to Rowlatt J. that case appears to me to have nothing to do with and to be perfectly distinguishable from the present case. In *Hancock's* case (2) the facts, which are sometimes lost sight of, were these. An actuary named Bumstead had been employed for many years by the company in question. He desired to retire, and on his retirement the company allowed him a pension of 666*l.* odd; it paid that pension for a good many years, but at length (as it is expressly put in the findings), as a matter of internal arrangement, it became in the company's view convenient, instead of continuing to pay him the annuity, to buy for him an annuity from an insurance company, and that the company did by expending a sum of 4000*l.* odd. It was the deduction of the expense of buying from the insurance company an annuity to the amount of his pension, instead of paying the pension every year as it became due, that Lush J. regarded as a deduction which could properly be made for the purposes of income tax. Whether that was a correct decision or not I do not propose to say. If the question again arises in the exact form in which it did in the case before Lush J., we may have to consider it, but what I do say about it is that that case was as different from that with which we have to deal almost as one case can be from another.

For the reasons I have already given I think in this case Rowlatt J. ought to have acted according to his own view and to have reversed the decision of the Commissioners, who also considered themselves bound by *Hancock's* case. (2) I think, therefore, that the appeal ought to be allowed.

(1) (1910) 5 Tax Cas. 529. (2) [1919] 1 K. B. 25.

C. A. 1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

SCRUTTON L.J. In this case Rowlatt J., somewhat against the view that he would have taken if left to himself, has thought himself bound, by a previous decision of a co-ordinate judge, to decide in a certain way. Therefore, one has carefully to consider what are the exact facts of this case and whether any principle laid down by *Hancock's* case (1) is really applicable to it.

The company here claimed to deduct from its profits a sum of 31,784*l.*, which it has paid to establish a Pension Fund for its employees. The deduction is objected to by the Crown on the ground that this sum is either not money wholly or exclusively laid out for the purposes of the trade or that it is a sum employed as capital in the trade. The Commissioners do not make their finding in the words of either cl. (*a*) or cl. (*f*) of r. 3 of Cases I. and II. of Sch. D, and I think perhaps it would be better if, in future, they did say exactly what they find in the words of the clauses: but having stated the contentions, they say: "In view of the decision in the case of *General Reversionary and Investment Co.* v. *Hancock* (1), the contribution of 31,784*l.* was an admissible deduction in computing the profits of the company for the purposes of the Income Tax Acts." Though they do not say so, I suppose that involves that it was money exclusively laid out for the purposes of the trade and not a sum employed or intended to be employed as capital. Obviously a case which may result in a definition by this Court of the line between capital and revenue expenditure must require very careful consideration by this Court, and the first thing that it must do is to bear in mind the warning of Lord Macnaghten in *Dovey* v. *Cory* (2): "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more."

(1) [1919] 1 K. B. 25. (2) [1901] A. C. 477, 488.

Bearing that warning of Lord Macnaghten's in mind, the first thing I do is to consider what are the facts in this case in order to see whether they will help me to settle the question whether this is a capital or a revenue expenditure, without attempting to lay down any general rule which will cover a number of cases which I have not in my mind at the present moment. The company had no Pension Fund for its employees. An employee who had served the company for many years and retired received nothing on retirement, and the company came to the conclusion that it was in its interests that it should have such a Pension Fund; that having such a Pension Fund would keep experienced servants in its employment instead of allowing them to go and get higher wages for their experience elsewhere outside the company. But the company was faced with this difficulty. If it started a Pension Fund on the ordinary lines, that each servant should contribute each year a percentage of his salary and that the company should add to it a sum in each year having some relation to the amount contributed by the servant, it started a system which would be actuarially insolvent, because the elderly servants who would be the first to retire would not have contributed, even when the contributions of the company each year were added to their contributions, anything like the sum which would be payable to them, and unless the contributions of the younger servants were fixed at a far higher rate than they would be inclined to pay the Fund would be heading straight for bankruptcy. The company, therefore, determined to start the Fund at once as far as it could in an actuarially solvent condition by finding out what sum ought to have been contributed in the past if the Fund was started in a solvent manner, and itself, without any contributions from the servants, providing the Fund with that sum at the outset. The actuary reported that he had calculated that the sum required would be 31,784*l.*, and that if this 31,784*l.* was contributed to the Fund at the start the annual contributions of the servants and the company would keep the Fund solvent. The company, accordingly, not being under any liability at the

C. A. 1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Scrutton L.J.

time, not paying it to any particular servant, but paying it to establish a solvent Pension Fund for the future, paid the 31,784*l.* The question is: Is that employing a sum as capital in the trade or is it money exclusively laid out for the purposes of the trade, not of the nature of capital? The Attorney-General started with a definition of capital, which I hope I took down correctly. It was: "Any money expended upon a business which is intended to and does result in an asset is capital." The next time the Attorney-General on one side or the other of a revenue case formulates that definition I hope he will look at Swinfen Eady L.J.'s very careful description in the *Ammonia Soda Co.* v. *Chamberlain* (1) of the difference between "fixed" capital and "circulating" capital, because I think there is no doubt that circulating capital as defined by Swinfen Eady L.J. would not come within the terms of the Income Tax Act of money to be employed as capital, but it would come within the terms of the Attorney-General's definition. Without professing or intending for a moment to lay down a definition myself, having in my mind Lord Macnaghten's warning not to embarrass business men, I think it is clear that you must add to the words defining "asset" something to show that you are only speaking of assets in the nature of fixed capital. You expend your capital goods to get back a profit, but the fact that you expend the goods or buy the goods does not make the asset which results a capital asset, because it is not fixed capital, but is something which, in the language of Swinfen Eady L.J., is going to be circulated. I think, therefore, to get capital you must have some permanent extension of the business, which results in some sort of asset. Again I am not proposing to lay down a definition, but anybody who tries to do so will find the statement in Lindley on Companies, vol. i., under the head of "Capital," of very great value. One of the matters mentioned there as being capital expenditure is the extension of the business. What resulted from this expenditure? In my opinion either capital was withdrawn from the business for this Pension Fund, in which case it

(1) [1918] 1 Ch. 266, 286.

would not come within r. 3, cl. (*f*), or the capital employed in the business created an asset or advantage of the business—this Pension Fund which had never existed and which now did exist for the benefit of the company. On these lines it seems to me that the payment of the sum was either a withdrawal of the capital or an employment of capital in the trade—no previous liability to do it, but something added to the business not in discharge of any existing liability, but creating some new asset.

Now if that is the proper way to view this case it seems to me that *Hancock's* case (1) has nothing to do with it. In *Hancock's* case (1) you start with an existing liability to pay year by year and you discharge that liability by the payment of a lump sum. That does not seem to me to add anything to the business. It may well be said to be money wholly laid out for the purpose of the business in discharging the existing liability to one's servant. On the other hand, where in a case like *Rowntree's* case (2), no previous fund and no previous liability existed, but in order to increase the advantages of the business and of the workmen, and therefore the proper carrying on of the business, you present a sum of 50,000*l.* to form a fund to be available against "invalidity," as it is called in the case, you appear to me to be adding an asset or advantage to the business of a permanent character. If then I am asked which case the facts in the present case come nearest to, it appears to me that they come much nearer to and to be practically the same as those in *Rowntree's* case (2) rather than those in *Hancock's* case (1); and I cannot see anything in the decision in *Hancock's* case (1) to preclude a judge from saying that, whatever there was in *Hancock's* case (1), in this case there is the addition of a capital asset to the business. This Fund could not be diverted from the business to any other business. It was for the benefit of the employees in that business, dependent on contributions by the employees in the business and by the company itself.

The conclusions, therefore, at which I arrive are: that Rowlatt J. was not bound by the decision in *Hancock's* case (1)

(1) [1919] 1 K. B. 25. (2) Ante, p. 328.

C. A. 1924

ATHERTON v. BRITISH INSULATED AND HELSBY CABLES, LD.

Scrutton L.J.

to say that this was not an employment of capital in the business; that it is not necessary in this case to say whether *Hancock's* case (1) was rightly decided (though I am inclined to think it was); and that this case is far more on the lines of the decision in *Rowntree's* case (2) than it is on those of the decision of Lush J. in *Hancock's* case. (1)

For these reasons I think that Rowlatt J. should have acted on his own view; that he was not bound by the decision in *Hancock's* case (1); and therefore, this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

W. I. C.

1924 *Dec.* 11.

WILLIAMS DEACON'S BANK, LIMITED *v.* BRADSHAW AND ANOTHER.

Practice—Interpleader—Summary Decision—Order of District Registrar—Appeal, whether to Divisional Court or Judge—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Rules of the Supreme Court, Order* XXXV., *r.* 9; *Order* LIV., *rr.* 21, 22A.

Where, on the hearing of an interpleader summons, a district registrar, with the consent of the parties, decides the matter in a summary manner, an appeal lies from his order to the Divisional Court.

APPEAL from an order of the district registrar of Preston in the Manchester district.

Certain debentures issued by H. Sharples & Son (Blackpool, 1920), Ld., which had been assigned to and deposited with Williams Deacon's Bank, Ld., to secure an overdraft granted by the bank to the said firm, or moneys arising from the said debentures, were claimed by J. G. Bradshaw and B. Feldman respectively. The bank interpleaded, taking out an originating summons in the district registry under Order LVII.,

(1) [1919] 1 K. B. 25. (2) Ante, p. 328.

r. 5, which called upon the two claimants to state the nature of their respective claims to the subject matter in dispute and maintain or relinquish them. On July 29, 1924, the district registrar, who, with the consent of both claimants, dealt with the matter in a summary manner under Order LVII., r. 8 (1), made an order directing (inter alia) that the claim of Feldman should be allowed, and that that of Bradshaw should be barred, but that the latter should have leave to appeal.

(1) The Common Law Procedure Act, 1860, provides:—

Sect. 17: "The judgment in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

The Rules of the Supreme Court provide:—

Order XXXV., r. 9: "Any person affected by any order, finding, or decision of a district registrar may appeal to a Judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the district registrar had jurisdiction only by consent. . . . ."

Order LIV., r. 21: "Any person affected by any order or decision of a master may (except in the cases provided for in rule 22A) appeal therefrom to a Judge at chambers. . . . ."

Rule 22A: "(1.) There shall be a right of appeal from any finding decision order or judgment arrived at made given directed or entered by any master of the King's Bench Division on the hearing or determination by him of

(*a*) Any trial or reference of any action cause issue or matter (including trials directed under Order XIV., rule 7), or any assessment of damages and whether by consent or otherwise, or

(*b*) Any interpleader or garnishee matter or issue whether by way of summary decision or adjournment of the interpleader or garnishee summons or order *nisi* or on an issue directed or otherwise and whether by consent or otherwise.

(2.) Such appeal shall be to a Divisional Court by notice of motion. . . . . (5.) In this rule master shall include a district registrar."

Order LVII., r. 8: "The Court or a Judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just."

Rule 11: "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way, under rule 8 of this Order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or Judge, as the case may be, or of the Court of Appeal."

1924

WILLIAMS DEACON'S BANK, LD. v. BRADSHAW.

The claimant Bradshaw gave to the claimant Feldman and to the bank notice of appeal dated August 11, 1924, to the Divisional Court, that so much of the order of the district registrar as barred his claim might be reversed or rescinded on the grounds therein stated.

R. H. Roope Reeve K.C. (*B. Ormerod* with him) for the respondent Feldman. There is a preliminary objection to the hearing of this appeal. Where a district registrar, with the consent of the parties, decides an interpleader matter in a summary manner under the Rules of the Supreme Court, Order LVII., r. 8 (1), no appeal lies from his decision, or at all events it does not lie to the Divisional Court.

Order LVII., r. 8 (1), under which the order in question was made, provides that "the Court or a Judge" may, with the consent of both claimants, dispose of the merits of their claims and decide the same in a summary manner. In that rule the term "Judge" must be taken to include a district registrar, who by Order XXXV., rr. 5 (*f*), 6, has the same jurisdiction as a judge in interpleader matters. Order LVII., r. 11 (1), provides that "except where otherwise provided by statute," the judgment in any action or on any issue in an interpleader proceeding, and the decision of the Court or a Judge in a summary way under r. 8 of that Order, shall be final and conclusive, unless by special leave. Here the order of the district registrar no doubt gave the appellant leave to appeal, so that it might seem that under that rule his order was not final and conclusive. It appears, however, from the notes to r. 11 in the Annual Practice, 1925, p. 1114, that neither that rule nor the Judicature (Procedure) Act, 1894, s. 5, has repealed or modified the Common Law Procedure Act, 1860, s. 17 (1), which provides that the judgment in any such action or matter as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive. This decision of the district registrar was therefore absolutely final and conclusive, and no appeal lies from it.

(1) See note (1) ante, p. 443.

1924

WILLIAMS DEACON'S BANK, LD. v. BRADSHAW.

If, however, any appeal does lie from this decision of the district registrar it does not lie to the Divisional Court but to the judge in chambers. Order XXXV., r. 9 (1), provides that any person affected by any order, finding, or decision of a district registrar may appeal to a judge, and that such appeal may be made notwithstanding that the district registrar had jurisdiction only by consent. There is no other or further appeal even by leave of the judge: *Van Laun & Co.* v. *Baring Bros. & Co.* (2); and see Annual Practice, 1925, p. 1113, note to Order LVII., r. 8. It is true that Order LIV., r. 21 (1), provides that any person affected by any order or decision of a master may, except in the cases provided for in r. 22A (1), appeal to the judge; and that Order LIV., r. 22A, provides: (sub-r. 1) that there shall be a right of appeal from any finding decision order or judgment arrived at by any master on the hearing by him of (*b*) any interpleader matter or issue whether by way of summary decision or otherwise, and whether by consent or otherwise, (sub-r. 2) that the appeal shall be to a Divisional Court, and (sub-r. 5) that in that rule master shall include district registrar. These latter provisions, however, in so far as they relate to an appeal from the district registrar, are inconsistent with the express and direct provision of Order XXXV., r. 9, that an appeal from a district registrar is to the judge, and they cannot affect that rule: see the note to Order LIV., r. 21, in the Annual Practice, 1925. The appellant's proper course was, therefore, to have appealed to the judge under Order XXXV., r. 9.

W. H. Moresby for the appellant was not called upon to argue this point.

SALTER J. In this case the district registrar, on the hearing of an interpleader summons, has made an order under Order LVII., r. 8 (1), determining the matter in a summary manner and giving leave to appeal. An appeal has been brought against his order, and the preliminary objection has been taken that no appeal lies from the order, or, at any rate,

(1) See note (1) ante, p. 443. (2) [1903] 2 K. B. 277.

1924

WILLIAMS DEACON'S BANK, LD. v. BRADSHAW.

Salter J.

no appeal to the Divisional Court. The answer to the question which thus arises depends ultimately upon Order LIV., r. 22A. (1) The Common Law Procedure Act, 1860, s. 17, no doubt limits the right to appeal in interpleader proceedings, but the question is at what point is the appeal limited. It is clear from the case of *Webb & Sons* v. *Shaw* (2) that, notwithstanding s. 17 of the Act of 1860 (1), there is an appeal from a master summarily deciding an interpleader matter to the judge in chambers. Order XXXV., r. 9, gives a right of appeal from the district registrar to the judge. Order LIV., r. 21 (1), gives a right of appeal from a master to the judge "except in the cases provided for in r. 22A"; and the last-mentioned rule provides: (sub-r. 1) that there shall be a right of appeal from a master on the determination by him of, among other things, any interpleader matter or issue whether by way of summary decision or otherwise, and whether by consent or otherwise, (sub-r. 2) that such appeal shall be to a Divisional Court by notice of motion, and (sub-r. 5) that in that rule master shall include a district registrar. An appeal is thus provided for in a case of this kind from the district registrar to the Divisional Court. Notwithstanding these provisions it is said that s. 17 of the Act of 1860 prevents any appeal from the district registrar to this Court, even by leave. In my view that contention is not well founded. By r. 22A the Divisional Court is substituted for the judge in chambers as the tribunal of appeal in a case such as this, and by s. 17 of the Act of 1860 the decision of this Court is final and conclusive. The preliminary objection fails.

MACKINNON J. concurred.

[The Court then heard the case upon the merits, and in the result dismissed the appeal.]

Solicitors for appellant: *Haslewood, Hare & Co., for A. Kidd Whitaker, Blackpool.*

Solicitors for respondent: *Robbins, Olivey & Lake, for Wilding & Son, Blackburn.*

(1) See note (1) ante, p. 443. (2) (1886) 16 Q. B. D. 658.

J. R.

BAYLEY *v.* WALKER.

1924
Dec. 12.

Landlord and Tenant—Rent Restriction—Rent exceeding standard Rent—Recovery of Rent overpaid—Recovery by Deduction—Deduction after Expiry of Six Months after passing of Act—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 14, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 8, *sub-s.* 2.

The limit of six months from the passing of the Rent and Mortgage Interest Restrictions Act, 1923, within which period overpaid rent is recoverable under s. 14, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by the tenant from the landlord, applies as well to recovery by deduction as to recovery by action.

APPEAL from Windsor County Court.

In 1920, the appellant, one Bayley, the plaintiff, was the owner of a cottage, which, at the time he purchased it, was let at a weekly rent in excess of the standard rent, a fact of which he was ignorant at the time. The tenant, the defendant, discovered this some time later, when the overpaid rents amounted in the aggregate to a considerable sum. In order to recover this from the landlord he ceased to pay rent, retaining the amounts as they became due by way of deduction, under the provisions of s. 14, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17). By s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), overpaid rent "shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards." The overpayments in question were made before the passing of the Act (July 31, 1923), therefore the six months expired on January 31, 1924. The defendant continued to deduct his rent after January 31, 1924, a substantial balance of the amount overpaid being still due on that date. The plaintiff contended that under the terms of s. 8, sub-s. 2, of the Act of 1923, the defendant had no right to so continue to deduct, and that, consequently, his rent was in arrear, and on that ground brought an action for possession. The county

1924

BAYLEY v. WALKER.

court judge held that the defendant was entitled to make the deductions after January 31, and that therefore the rent was not in arrear, and gave judgment for the defendant.

The plaintiff appealed.

Earengey for the plaintiff. The defendant had no right to deduct after January 31. Under s. 14, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920, he could recover the overpaid rent either by action or by deduction or both, but by s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, he could only recover it within a period which in the present case expired on January 31, 1924. Therefore he could not, after January 31, commence proceedings to recover the money, and it cannot have been intended that the right of recovery by deduction should be wider than the right of recovery by action. See the judgment of Swift J., approving the judgment of the county court judge in that case, in *Algate* v. *Vugler*. (1) And Atkin L.J. in *Diment* v. *Roberts* said (2): "Section 14 . . . . gives one method of recovery, by deducting from the next rent payable; that would clearly continue for six months," which shows that Atkin L.J. thought the right would not continue beyond that time.

W. S. M. Knight for the defendant. There is another method of obtaining repayment besides action and deduction —namely, by agreement. Suppose a landlord gave a bill for the amount of the overpaid rent payable by instalments after January 31; it would be impossible to say that there was no consideration for it. In those circumstances, therefore, the period would extend beyond the six months. Here such an agreement may be implied from the facts.

SALTER J. This was an action by the landlord, the appellant, for the recovery of possession of a cottage on the ground that the rent was in arrear, and the question was whether the rent was in arrear or not. The county court judge held that it was not, and gave judgment for the defendant, the tenant. We have to decide whether, on the facts, he was

(1) [1924] 2 K. B. 136, 141. (2) Ante, pp. 9, 13.

1924

BAYLEY v. WALKER.

Salter J.

right in law in holding that the rent was not in arrear. The facts were that the defendant had paid considerable sums to his landlord, the plaintiff, in excess of his proper rent, and that excess, under the provisions of s. 14, sub-s. 1, of the Increase of Rent, &c. (Restrictions) Act, 1920, was recoverable by the defendant from the plaintiff. Accordingly he paid no rent for some time, retaining the sums due as rent by way of deduction, as he was entitled to do by the sub-section. That was the state of things on January 31, 1924. At that time there still remained a considerable sum of the overpaid rent which the defendant had not recovered, and the question which arises is whether he had the right to continue to make deductions after January 31. The matter turns on the construction of s. 14 of the Act of 1920, and of s. 8 of the Act of 1923. Sect. 14, sub-s. 1, gives a general right of recovery, either by action or by deduction. That provision was modified by the Rent and Mortgage Interest Restrictions Act, 1923. Sect. 8, sub-s. 2, provides that any sum "which, under sub-s. 1 of s. 14 of the principal Act [of 1920] is recoverable by the tenant . . . . shall be recoverable at any time within six months from the . . . . passing of this Act but not afterwards." The six months expired on January 31, 1924. In my opinion the effect of these two sub-sections is that the general right of recovery of overpaid rent, whether it be by action or deduction, is limited by the Act of 1923 to the period of six months from the date of the passing of the Act, which period expired in this case, as I have said, on January 31, 1924. Up to that date the tenant might have issued a summons and recovered the balance then remaining of the overpaid rent, but as he allowed that date to go by without doing so he cannot now recover it by action, nor can he do so by deduction. Two authorities were cited to us: *Algate* v. *Vugler* (1) and *Diment* v. *Roberts*. (2) The actual question in the former case was whether it was sufficient if proceedings to recover overpaid rent were commenced within the six months period limited by s. 8, sub-s. 2, of the Act of 1923, and it was held that it

(1) [1924] 2 K. B. 136. (2) Ante, p. 9.

1924

BAYLEY v. WALKER.

Salter J.

was. Swift J. said (1), quoting with approval the words of the county court judge: "'The words of the Act are "shall be recoverable" and not "shall be recovered." In my opinion by "shall be recoverable . . . . at any time within six months from the passing of this Act but not afterwards" is meant "shall be a sum capable of being recovered by deduction from rent, action or otherwise at any time within, etc." In other words, during that period it shall be capable of recovery, but after that period it shall be incapable of recovery. . . . .'" It is quite obvious that Swift J. thought that the statute imposed the limit of time for recovery whether by action or deduction. The question has also been considered in the Court of Appeal in *Diment* v. *Roberts*. (2) Atkin L.J. said that "the words 'recoverable at any time within six months' meant that the sum might be recovered if any legal proceedings had been brought within six months. Sect. 14 of the Act of 1920 gave one method of recovery, by deducting from the next rent payable, which would clearly continue for six months. Taking all the facts into consideration, he (Atkin L.J.) thought it very improbable that the Legislature intended that the tenant should recover up to the last week by deducting from the rent, but not recover by taking proceedings unless judgment had actually been delivered." It was no doubt not necessary in that case to decide the present point, but it is clear that Atkin L.J. assumed that the right of recovery by deduction was barred at the same time as the right to recovery by action.

In my opinion the decision of the county court judge was wrong in law, and this appeal succeeds.

MACKINNON J. I agree. *Appeal allowed.*

Solicitors for plaintiff: *Bower, Cotton & Bower, for T. W. Stuchbery & Son, Maidenhead.*

Solicitors for defendant: *E. M. Tringham, for Barrett & Thomson, Slough.*

(1) [1924] 2 K. B. 136, 141.

(2) 40 Times L. R. 861, 862; since reported ante, pp. 9, 13.

W. L. L. B.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1924 *June* 27. C. A. *Nov.* 3, 4.

INLAND REVENUE COMMISSIONERS *v.* FISHER'S EXECUTORS.

Revenue—Super Tax—Assessment—Shareholder—Distribution of Profits in the Form of Debenture Stock—Capital or Income—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66.

A limited company with large undistributed profits resolved to capitalize part of these profits and to distribute them pro rata among its ordinary shareholders as a bonus in the form of 5 per cent. debenture stock. This stock was duly issued, the conditions providing that the company might redeem the stock after a certain time and in certain events.

The respondents, who had received their due proportion of the above debenture stock, were assessed to super tax under the Finance (1909–10) Act, 1910, for a certain year in respect of their stock :—

Held, by Rowlatt J., that the issue of debenture stock was not a capitalization of profits, but the creation of a security, which gave to the holders their share of the undivided profits at once, and that super tax was payable thereon.

Held, by the Court of Appeal (reversing the decision of Rowlatt J.), that the effect of the transaction was that the debenture stock was distributed to persons who were entitled to the assets of the company; that the bonus was declared in such terms as ensured that the profits should remain in the hands of the company; that none of the assets of the company were parted with by distribution, and therefore that the bonus paid in debenture stock was not income in the hands of the respondents and was not therefore liable to super tax.

Inland Revenue Commissioners v. *Blott* [1921] 2 A. C. 171 discussed and applied.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts as appearing from the case stated were as follows.

The respondents were the personal representatives of the Right Rev. G. Fisher, deceased, who had been assessed to super tax in the sum of 8250*l.* for the year ending April 5, 1916, under the Income Tax Acts. The assessment related to a bonus received by Mr. Fisher from the Wearmouth Coal Co., Ld., in the year 1914–15. In the company's balance-sheet for 1913 appeared the following items of undistributed profit :—

1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Amount standing to credit of profit and loss account..	167,279*l.*
Reserve fund	293,035*l.*
Royalty rent suspense account ..	14,502*l.*

On March 25, 1914, the directors, in a circular letter to the shareholders, stated that as the reserve funds and undivided profits were large, and had been expended in increasing the capital value of the property, it should in their opinion be capitalized and secured to the shareholders, and that they proposed to take steps to capitalize 357,500*l.* by distributing it pro rata among the ordinary shareholders in the form of 5 per cent. debenture stock. They proposed also that the preference shares in the company should be acquired by the ordinary shareholders in exchange for a corresponding amount of debenture stock. Meetings of the company were called and special resolutions passed to effect this purpose. An agreement, dated April 28, 1914, providing for the exchange of debenture stock for preference shares was then executed, and the necessary alterations made in the articles of association. On May 21, 1914, resolutions were passed at meetings of the ordinary and preference shareholders in the company respectively "that it is desirable to capitalize the sum of 357,500*l.*, being part of the undivided profits of the company . . . . for the year ending December 31, 1913, and accordingly that that sum be distributed as a bonus among the holders of the ordinary shares in proportion to the amounts paid up or credited as paid up on the ordinary shares held by them respectively." On July 31, 1914, a debenture stock trust deed was executed and the debenture stock duly issued. The debenture stock became repayable upon the usual events, and the conditions of issue provided (inter alia) that the company might from time to time redeem the stock at any time after January 1, 1920, on giving six months' notice in writing, and that if not so redeemed it was to be redeemed at par so soon as the security became enforceable.

The deceased held 14,400 ordinary shares of 5*l.* each, of

which 12,000 were fully paid, and as to the balance 2*l.* 10*s.* only was paid upon each share; he also held 7640 preference shares of 5*l.* each, all fully paid. In virtue of his holding of ordinary shares he became entitled as his share of the bonus to 82,500*l.* of debenture stock, of which, in accordance with the agreement of April 28, 1914, 16,540*l.* had to be parted with in exchange for a corresponding amount of fully paid preference shares, with the result that 65,960*l.* debenture stock was retained. He did not receive, nor was he entitled to receive, any payment in cash for his share of the bonus, and the net result was that he retained his 14,400 ordinary shares, obtained 3308 preference shares from preference shareholders, and so held 10,948 preference shares instead of 7640, and also received 65,960*l.* in the debenture stock of the company.

It was contended for the respondents that the debenture stock was distributed to persons who were entitled to the assets of the company; that the bonus was declared in such terms as ensured that the profits should remain in the hands of the company; that none of the assets of the company were parted with by the distribution; and that the case was covered by *Inland Revenue Commissioners* v. *Blott.* (1)

On behalf of the Crown it was contended that there was a liberation of assets and a distribution of profits by the company to the ordinary shareholders, and that the amount received by them was income in their hands; that there was a distinction between a debenture stockholder and a shareholder, in that the former was a creditor of the company; and that the bonus distribution was income to the recipient and was liable to assessment to super tax.

The Commissioners held that the bonus paid in debenture stock was not income in the hands of the recipient, and was not therefore liable to super tax.

At the request of the Crown, the Commissioners stated this case for the opinion of the Court.

Sir Patrick Hastings A.-G. and *R. P. Hills* for the Crown. The question is whether or not this debenture stock issued

(1) [1921] 2 A. C. 171.

1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

by the company as a bonus to the shareholders forms part of the total income of a shareholder "from all sources for the previous year" for purposes of super tax. In *Blott's* case (1) the question arose upon the distribution of bonus shares out of current profits, and the shares were held to be an addition to capital. Here the share capital was not increased, the holder received the bonus in an entirely different form, and *Blott's* case (1) is distinguishable. The money was here applied by way of funded loan to the company in the form of debenture stock issued to the shareholders. In *Blott's* case (1) the shareholders had an option to call for the money.

In *Inland Revenue Commissioners* v. *Doncaster* (2) the company paid undivided profits into a loan account for the benefit of shareholders, and it was held that there was a complete payment, so that super tax was payable.

[ROWLATT J. In that case the directors were practically carrying on a banking account for the shareholders.]

Yes; the transaction was described by the company as a funded loan.

They referred also to *Roe* v. *Inland Revenue Commissioners.* (3)]

The decision in *Blott's* case (1) ought not to be extended. If preference shares had been issued in the present case instead of debenture stock repayable after a term of years, *Blott's* case (1) might have applied. There is an essential difference between a shareholder and a creditor, in which category a debenture stock holder is included. The mere fact that the company distributes money's worth and not money does not prevent it from being income in the hands of the recipient, and here the debentures were redeemable by the company after 1920.

There can be no capitalization except upon terms. The Commissioners have wrongly extended the effect of *Blott's* case (1) to the present case and super tax is here payable.

Latter K.C. and *Cyril King* for the respondents. Here there has been no release of assets, only the apportionment

(1) [1921] 2 A. C. 171. (2) (1924) 40 Times L. R. 433.
(3) Unreported. March 3, 1924.

of a sum as capital stock which was in a commercial sense increased by the issue of debenture stock. In *Pool* v. *Guardian Investment Trust Co.* (1) Sankey J. said: "If there has been no release of assets there has been no distribution and there is nothing to tax, neither is there anything to tax if the release is the distribution of capital. *Blott's* case (2) was so decided because the majority of the members of the House of Lords were of opinion that there had been no release of assets." Here there was merely an ingenious rearrangement of capital, altering the right of the shareholders.

A debenture stockholder is not a creditor in the ordinary sense, for he cannot present a winding-up petition as such: *In re Dunderland Iron Ore Co.* (3) The reserve profits were here capitalized in that it became out of the power of the company to distribute them and the repayment of the loan to the stockholder was secured.

[They referred to *Cross* v. *Imperial Continental Gas Association.* (4)]

In *Inland Revenue Commissioners* v. *Burrell* (5) it was held that undivided profits which were distributed among the shareholders in a winding up had ceased to be profits and become assets, and that no super tax was payable thereon. Here the respondents cannot be said to have received "income" merely because they obtained priority in a winding up by virtue of their debentures. The value of the original holding is in fact decreased owing to part of the assets being taken in the form of debentures. The capital and the share capital remained unaltered. No money or money's worth was taken out of the company's coffers which was not there before. In *Attree* v. *Hawe* (6), where the company had issued debenture stock charged on land, the Court of Appeal held that the debenture stock was merely a charge on the net profits of the corporation, and was not in tself real property any more than the share stock. The

(1) [1922] 1 K. B. 347, 356.
(2) [1921] 2 A. C. 171.
(3) [1909] 1 Ch. 446.
(4) [1923] 2 Ch. 553.
(5) [1924] 2 K. B. 52, 68.
(6) (1878) 9 Ch. D. 337.

1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

debenture stockholder is merely a preferred shareholder with peculiar privileges. The test is given by Lord Finlay in *Blott's* case (1) as being whether the shareholder has received benefit in the nature of income: for upon income alone can super tax be levied. In that case the shareholders did not receive the money as income, and the respondents did not receive the debenture stock here as income. The money was impounded by the company and used for trading purposes. In *Burrell's* case (2) Atkin L.J., quoting from the judgment of Scrutton L.J. in *Blott's* case (1), said that what the shareholder received was his share of the joint stock "not income of the property, but the property itself." In *Roe* v. *Inland Revenue Commissioners* (3) a dividend was declared in the ordinary way and the shares were purchased. In *Inland Revenue Commissioners* v. *Doncaster* (4) the shareholders had the option of taking cash, but that was not so here, and the fact that the respondents could sell the debenture stock makes no difference. No cash was received by the respondents, and there was capitalization in an effective sense by the company.

Sir Patrick Hastings A.-G. in reply.

[He was stopped.]

ROWLATT J. The company in this case had a large amount of undivided profits and it issued to its ordinary shareholders debenture stock in respect of these profits, one of the terms of the issue being that the ordinary shareholders should buy out the preference shareholders. The company purported in terms to capitalize these profits, but that is not a true description. For "capitalizing" profits means, as in *Blott's* case (1), that the proprietary capital of the company is increased. Here the profits were only capitalized in that they were impounded and kept for the company's use. It was contended for the respondents that the company recognized that the profits belonged to the shareholders pro rata, and that their rights were secured by the issue of the

(1) [1921] 2 A. C. 171.
(2) [1924] 2 K. B. 52, 68.
(3) Unreported. March 3, 1924.
(4) 40 Times L. R. 433.

debenture stock, which was not payable at the instance of the shareholders, but could only be enforced on the happening of certain events, and that therefore it was not a payment of dividend at all. By the receipt of this stock the shareholders were placed in a different position. They obtained the right to call for the amount of their share of the undivided profits in preference to outside creditors, if the company was wound up. The result was that no longer would there appear on the balance sheet this great preponderance of undivided profits, because against them would stand the securities which had been issued. Now a security issued upon property which sooner or later has to be realized places part of the property in the hands of the persons to whom it is issued, not physically at the moment, but in substance. Under these circumstances it seems to me that there was here the creation of a security, and of a security worth money, and that it was an issue to the shareholders giving them at once their share of the undivided profits. This stock may bear interest which will make it worth more than its face value. On the other hand it may be worth less than its face value. The face value is not necessarily the measure of the tax which the respondents must pay, and the case will therefore go back to the Commissioners for the amount to be assessed.

F. P. F.

Fisher's executors appealed. The appeal was heard on November 3 and 4, 1924.

A. M. Latter K.C. and *Cyril King* for the appellants.

Sir Patrick Hastings K.C. and *R. P. Hills* for the Crown.

The arguments used in the Court below were substantially repeated.

POLLOCK M.R. This is an appeal from a decision of Rowlatt J., who set aside the decision of the Commissioners for Special Purposes of the Income Tax Act.

The case is this: The executors of the late Bishop Fisher appealed against an additional assessment to super tax made

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Pollock M.R.

upon them in the sum of 8250*l.* for the year ending April 5, 1916, in respect of a bonus received by him from the Wearmouth Coal Co., Ld., in the year 1914–15. It appears that the late Bishop Fisher had held some ordinary shares and also, I think, some preference shares in the Wearmouth Coal Co., Ld., and that the company had been for a time prosperous, with the result that on December 31, 1913, in the company's balance sheet there appeared a sum standing to the credit of profit and loss account of 167,279*l.*, there was also standing to the reserve fund 293,035*l.* and to the royalty rent suspense account 14,502*l.* The directors came to the conclusion that instead of leaving these undistributed profits as they stood it would be wise to make use of them and to deal with them by the creation of debenture stock, which should be issued to the ordinary shareholders. Inasmuch as there were preferential shareholders who would be entitled not only to their dividend in preference to the ordinary shareholders, but also a preference on a distribution of capital upon any winding up of the company, and that distribution of their capital might be prejudiced by the creation of a prior charge which would have a prior right if the capital ever had to be distributed, the company determined that the best course would be to get rid of the preference shares altogether and so, by buying out the interests of the preference shareholders, to leave the company in the position of having ordinary shareholders only with this debenture stock, which would be owned by the ordinary shareholders. Accordingly on March 25, 1914, the directors of the company wrote to the shareholders a letter, in which they stated that they had determined that these reserve funds and undivided profits which were of the large amount to which I have referred, should be capitalized and secured to the shareholders, and that they proposed to take the necessary steps to effect the capitalization of the total sum of 357,500*l.* of these reserve funds, which is I think approximately the exact figure of the three sums to which I have referred before, by distributing this amount pro rata among the ordinary shareholders in the form of 5 per cent. debenture stock, and in the next paragraph of the letter

they said that the creation of debenture stock might be prejudicial for the reasons which I have given to the holders of the preference shares, and, therefore, the whole of the preference shares were to be acquired by the ordinary stockholders in exchange for a corresponding amount of debenture stock. In the particular case of Bishop Fisher a letter was written to him informing him that the sum that he would be entitled to as his aliquot part of the debenture stock created would be the sum of 82,500*l.*, and that that sum would be used in this form: "You are to receive under the terms of the agreement debenture stock amounting to 65,960*l.* and 3308 preference shares of 5*l.* each," that being the amount in number of the preference shares which it would fall to his lot to bring up and so cancel, which made the total nominal value of 16,540*l.*, and those two sums, the 65,960*l.* of the debenture stock which was to be out and out issued to him and the value of the preference shares, which was 16,540*l.*, would together make the total sum of 82,500*l.*, which was the amount of the bonus, the aliquot portion of the distribution to be made to him out of the 357,500*l.* of the debenture stock created. That was carried out.

Now the Revenue authorities claim that in respect of this bonus, a bonus of debenture stock so received by the late Bishop Fisher, they are entitled to charge him super tax. In order that they may do this they must show that what he received was part of his total income from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts; and the question therefore is, is this bonus of debenture stock to which Bishop Fisher became entitled to be treated as part of his total income for the year in which the charge is claimed to be made? I agree with Mr. Hills that we are not bound, and the Revenue authorities are not bound, by the particular words which are used by the company in informing their shareholders of what they are going to do. It does not matter that they say that they are embarking on a plan of capitalization, nor that they are embarking on a

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Pollock M.R.

plan of distribution if in fact what they are doing is not truly capitalization or is not truly distribution. One has to look in these tax cases, as Lord Cave says in *Blott's* case (1), at the substance and not the form of the transaction.

What was the substance of the transaction? I think it is important for a moment to consider the balance sheet of the company as it stood before the operation was carried out. Before it was carried out the matter stood in this way: The balance sheet showed that there were these three items, which I have already referred to, totalling 357,500*l.*, which represented profits or reserve funds. After the operation had been carried out the profits and reserve funds no longer find their place in the balance sheet, but are now represented by debenture stock created. In other words: the company have used those assets for the purpose of creating debenture stock, and the money for that debenture stock is provided out of the money standing to the credit of the profit and loss account and the reserve funds. The debenture stock which has been created is money lent to the company upon terms which make it repayable by the company only at the particular period and on the terms and conditions which are laid down in the debenture deed. If a part of the reserve fund or the money standing to the credit of the profit and loss account were paid out to the shareholder simply as cash I think it would be clear that what had been paid to the shareholder was his aliquot share of the profits, of income accumulated during a period of years and paid out to him as such. That was not done. An offer was made to the shareholders, obviously in their interest, that instead of receiving cash paid to them they should be given in a particular form something which thereafter would represent the amount standing to the credit of the profit and loss account and the reserve funds; but it was given in a particular form only, and the form in which it was given was determined, and determined finally by the company itself.

It is contended that what the shareholder has received is

(1) [1921] 2 A. C. 171, 201.

a part of the profits which the company previously held. As I have pointed out the company determined, first of all, that those undivided profits should be used for a particular purpose—namely, the creation of debenture stock—and that thereafter that debenture stock, when created, should be given out to the shareholders not merely as debenture stock, but debenture stock in a particular form to be used pro tanto for the swallowing up of the preference shares. The Commissioners who heard the appeal held that the bonus paid in debenture stock was not income in the hands of the recipient and was not liable to super tax. Rowlatt J. has held that it was liable. I will say at once why I find myself unable to agree with his judgment. He refers to *Blott's* case (1), and I must refer to that case in a moment. Rowlatt J. in the present case says: "Now a security issued upon property which sooner or later has to be realised places part of the property in the hands of the persons to whom it is issued, not physically at the moment, but in substance. Under these circumstances it seems to me that there was here the creation of a security, and of a security worth money, and that it was an issue to the shareholders giving them at once their share of the undivided profits." Upon the facts found by the Commissioners I cannot agree with him that what has been issued was issued to the shareholders by way of giving them at once their share of these undivided profits. It appears to me from the findings of the Commissioners that the company turned the undivided profits into a particular form which the shareholder could not question, and that they gave him a part of the debenture stock created which did not give him at once a share of the undivided profits, but gave him a right in certain circumstances to call for the payment of the debenture stock if and when according to the terms and conditions on which it was issued they had a right to do so.

The argument on behalf of the Crown may be compendiously said to be the argument which is put forcibly and very clearly by Lord Dunedin in his speech in *Blott's* case (1), but Lord Dunedin and Lord Sumner were dissentients from the

(1) [1921] 2 A. C. 171.

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Pollock M.R.

judgment pronounced by the majority. It appears to me that the Commissioners have found, and rightly found, that what has been done is that the structure of the company and the relation of the shareholder to that structure has been altered while the company and not the shareholder determined what that relation should be. No longer are there any undivided profits, no longer is there any reserve fund, but there are debenture holders. All that has been determined by appropriate and legal steps taken by the company.

The Attorney-General argues that the shareholder was getting money's worth. So he did in *Blott's* case (1), where the bonus shares were held to be capital. The Attorney-General answers that where the shareholding of the shareholder is not affected, but the shareholder retains the same aliquot share in the assets of the company, then there is not a distribution of capital, but a distribution of profits. It may be that the shareholder would be entitled upon a liquidation to the same aliquot share of the assets of the company. But we have to look at it not from the point of view of company law; and I agree with Mr. Hills that we have not to look at it from the point of view of what ought to be the position as between a tenant for life and a remainderman under a will or settlement such as had been done in a number of cases to which he was prepared to refer; but we have to look at it from the point of view of super tax law, and to see whether or not this portion of the debenture stock received by the late Bishop Fisher is a part of his total income estimated in the same manner as it would be estimated for income tax purposes.

Now in *Blott's* case (1) there was a distribution of shares. The shareholder was not given any option as to whether or not he would take shares or cash. The undistributed profits were to be used for the purposes of providing the money represented by the shares, shares which the company had a right and power to issue. Looking at the reasoning of *Blott's* case (1) it seems to me that the present case falls

(1) [1921] 2 A. C. 171.

within it. In fact these undivided profits turned into the form of debenture stock do increase the available capital of the company for its trading purposes. It may be used in any way the company desire. As Lord Finlay points out in his speech in *Blott's* case (1): "No option was left to any particular shareholder. He was compelled by the action of the company to take the preference shares." So, here, no option was left to the shareholder: he was compelled to take this particular debenture stock. "He could not," as Lord Finlay continues, "have sued for the bonus in money, as the resolution which gave the bonus uno flatu declared that it was to be satisfied by the distribution of the preference shares. Under these circumstances it seems to me impossible to treat the shareholders for the purpose of super tax as having received the bonus and paid it back to the company to be retained as capital. They never received it at all." So, here, I do not think that Bishop Fisher received his aliquot share of the undivided profits. Again to quote Lord Finlay (2): "There can be no super tax upon income unless it has been received by the taxpayer." He adds a phrase which I think is important. (3) "Instead of his getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business." So, here, the company might have distributed the undivided profits or the reserve fund, but instead of that the directors adopt and the company agree to this particular method which ensures to the company the use of this sum as capital and not otherwise. If there is a distribution or if there is allotted to the shareholder something as to which he can exercise some choice or volition it may be (I do not say it must be) income. But as in *Blott's* case (4), so here, the company has the dominant voice in what it will give and in what form it will give the undivided profits to the shareholder. The shareholder himself has no voice at all, and when he receives what he does receive, he receives it not in the old form as it stood in the

(1) [1921] 2 A. C. 194.
(2) Ibid. 195.
(3) [1921] 2 A. C. 196.
(4) Ibid. 171.

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Pollock M.R.

balance sheet of undivided profits or reserve fund, but in the particular form which he was compelled to acquiesce in owing to the conduct of the majority of the shareholders of the company. Lord Cave says with regard to *Blott's* case (1): "The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets; and the only result was that the company, which before the resolution could have distributed the profit by way of dividend or carried it temporarily to reserve, came thenceforth under an obligation to retain it permanently as capital." So here there could have been a distribution of this sum, but instead of there being a distribution it was put into such a form that the company now remain liable for the debenture stock and will have to pay it as and when it becomes due. Looking therefore at the substance of the transaction, it appears to me that what has been done is that Bishop Fisher's estate has been given something in a particular form which he was compelled to receive, a form different from the undivided profits that originally stood in the balance sheet, but a particular form which compelled him to stand as a creditor of the company, a creditor for a capital sum due from the company and in no sense as the recipient of the original undivided profits.

For these reasons it seems to me that Rowlatt J.'s decision is wrong and that the decision of the Commissioners ought to be restored, and the appeal allowed with costs.

WARRINGTON L.J. I am of the same opinion. In the year 1914 the late Bishop Fisher, who was an ordinary shareholder in the Wearmouth Coal Co., Ld., became entitled by virtue of certain resolutions of the company to an allotment of 82,500*l.* newly created debenture stock of the company. The Crown contends that this 82,500*l.* must be treated as income of Bishop Fisher and therefore brought into account in assessing him to super tax. The Commissioners took the view that the sum in question was not income, but was capital of the estate of the late Bishop Fisher, but their decision

(1) [1921] 2 A. C. 171, 200.

was reversed by Rowlatt J., who came to a decision in favour of the Crown. This appeal is from Rowlatt J.'s judgment.

Now, the real question is whether the company did in the present case make amongst its shareholders a distribution of profits. It is well settled that the action of a company in such matters not only binds its shareholders as between them and the company, but determines as between them and the Revenue whether the result of the transaction is the receipt by the shareholders of taxable income as distinguished from something which is not so taxable. The action of the company then being the determining factor it is necessary to consider whether the company did or did not in the present case make a distribution of profits amongst its shareholders. The nature of what they in fact did is not in its details material in itself. The details of what they did are material in order to determine whether they made a distribution of profits or did something else. The position of things at the time the resolutions of the company were passed was this: there stood to the credit of the reserve fund in the books of the company a sum of 357,500*l.* That sum was not represented by any separate tangible or realizable assets, either in the shape of cash or in any other form. It was simply represented by the general assets of the company and included in them. The result of what the company did was this, and it happens to be represented, I think, by the accountants' balance sheet. The form in which the accountants express what has taken place does not always express the actual facts, but I think in this case it does, and if you look at the balance sheet of December 31, 1914, which was the first balance sheet prepared after the transaction had taken place, it is pretty clear that it does so. On that balance sheet you find amongst the liabilities 357,500*l.* reserve fund. That is cancelled by the entry "Less bonus distributed, July, 1914, in the form of debenture stock." Those two entries cancel each other, but in lieu of those there is inserted immediately after the statement as to the share capital of the company this entry: "5 per cent. debenture stock: authorised—500,000*l.*—issued 357,500*l.*" You get, therefore, the same sum that was the

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Warrington L.J.

liability of the company before entered again as the liability of the company, but in this special form, as a liability in respect of debenture stock. What is the effect of that? Before the transaction with which we have to deal the reserve fund simply constituted a part of the property of the company. It was not separated in any way. It appeared as part of the property of the company, and unless it had been inserted as a liability in the balance sheet it would have simply increased the balance of assets over liabilities. It remained, therefore, the property of the company. The shareholders individually had no right to any part of it. It rested entirely with the company whether they should retain that sum as it was or distribute it amongst the shareholders. What change has the actual transaction made in that state of things? It has made this change and, as it seems to me, this change alone, that the shareholders now, looking at it from their point of view, instead of having a right on winding up or any such state of circumstances to receive as shareholders a share in the assets of the company become in respect of this 357,500*l.* secured creditors individually each one for his share in that sum for the amount of his debenture stock. Nothing is taken from the company. The company still have amongst their assets the whole of that 357,500*l.*, but they owe it to the individual shareholders, so far as the debenture stock may be said to create a debt. It can be used for extension of the company's business or for any other purpose to which the company choose to apply it. The transaction amounts, in my opinion, in substance to an increase in the capital of the company, using the word "capital" in its commercial sense and not in the more technical and limited sense in which you speak of the capital of a company governed by the Companies Acts, but for commercial and practical purposes the result of the transaction is, as it seems to me, to increase the capital of the company. If that be so, then there certainly is no distribution of profits among the shareholders. They had no option. Their bonus consisted, without any choice on their part, of the conversion of that indefinite interest which they had in all the assets in the company to

an individual interest in each case as a holder of a portion of this debenture stock. If I am right in what I have said it follows necessarily that this transaction did not amount to a distribution of profits.

So far I have said nothing about the authorities, and it is unnecessary to refer to any of them, except the decision of the House of Lords in *Blott's* case. (1) Of course, in *Blott's* case (1), as in so many cases which are referred to here as authorities on the case which one has to determine, the facts were not identical with those in the present case, but you must go behind the facts and see what was the principle which guided the tribunal in coming to the decision it did. I think the principle appears very clearly in the judgment of Lord Cave. I do not mean to say it does not appear clearly in the other judgments, but I happen to select as a clear statement of it the passage in the judgment of Lord Cave where, referring to the transaction in that case, he says (2): "Did this amount to a distribution of profits? I think not. The resolution did not give to any shareholder a right to sue for the dividend in cash, his only right being to have an allotment of fully-paid shares in the capital of the company." So here the resolution of the directors gives no right to any shareholder to sue for the amount of his bonus in cash; the only right which he had was to have an allotment of debenture stock. Then he goes on: "The profits remained in the hands of the company as capital, and the shareholder received a paper certificate as evidence of his interest in the additional capital so set aside." So here the profits remained where they did in the hands of the company as capital in the wider sense to which I have referred, and the shareholder received a paper certificate as evidence of his interest in the additional capital so set aside. Then Lord Cave continues: "The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets; and the only result was that the company, which before the resolution could have distributed the profit by way of dividend or carried it temporarily to reserve, came thenceforth under an obligation

(1) [1921] 2 A. C. 171. (2) Ibid. 200.

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Warrington L.J.

to retain it permanently as capital." So here the company retained this money, not perhaps permanently, but they retained it upon the terms and conditions expressed in the debenture stock trust deed. In my opinion, in principle, though not in detail, the decision in *Blott's* case (1) covers the present case.

I have purposely omitted complicating what I had to say by reference to the transactions between the ordinary shareholders as entitled to debenture stock and the preference shareholders. I do not propose to discuss that at all. I only mention it to show that I have not forgotten it. In substance what the company did to the ordinary shareholders was to provide for the allotment to them of debenture stock proportionate to the amount of their holding of ordinary shares, but by virtue of the rest of the transaction each shareholder, according to the amount of his holding, became, or in some cases might not become—as happened—bound to acquire preference shares with a part of that debenture holding. It makes no difference to the substance of the transaction. It is much simpler for the purposes of our decision to treat the transaction as it relates to debenture stock, and to that only. In my opinion, the appeal succeeds, and, with all respect to Rowlatt J., the judgment was incorrect and must be set aside, and a decision given in favour of the taxpayer.

SCRUTTON L.J. As we are differing from the learned judge below and as Mr. Hills has summarized his argument in a very confident assertion that if the House of Lords which decided *Blott's* case (1) against him had had these facts before them they would have decided in his favour, I with due submission express my judgment against him in my own words.

This colliery company had in 1913 a reserve fund of 293,035*l.* and a balance to the credit of profit and loss of 167,279*l.*, and, to use its own language, it proposed to capitalize 357,500*l.*, being part of the undivided profits of the company. The way

(1) [1921] 2 A. C. 171.

it proposed to capitalize it was by issuing as a bonus to the owners of ordinary shares debenture stock to the extent of 357,500*l.* That debenture stock would recognize a debt due from the company to each owner of ordinary shares of a specific amount payable either at some future date when the company made certain defaults, or suffered execution, or when the company desired to redeem, or when the company was wound up, but payable at a time with which the shareholder as such had nothing to do. He could not settle at all when it was payable, but he had debenture stock giving him a charge on the assets of the company for that amount and carrying interest at the rate of 5 per cent. up to the time when the principal became payable. One further fact I should state. Carrying out that transaction, the late Bishop Fisher, who was a large shareholder in the company, received 82,000*l.* odd debenture stock. The Crown say that he must pay super tax on that debenture stock, which has not yet been precisely valued, but which they take roughly at 80,000*l.*, as part of his income for the year, and I think it would follow, though it is not necessary to decide it in this case, that if Bishop Fisher were a tenant for life and there were a remainderman they would say that the debenture stock belonged to him as income and did not belong to the remainderman. Now, as was said in *Bouch* v. *Sproule* (1), when that class of question was under discussion, you have to look at the substance of the whole transaction, and it was found in *Bouch* v. *Sproule* (1) that the substance of the transaction was to convert the undivided profits into paid-up capital upon newly created shares, and as it was a conversion into capital and not a payment of income, the bonus shares went in *Bouch* v. *Sproule* (1) to the remainderman and not to the tenant for life. Now looking here in the same way at what is the substance of the transaction, it seems to me that it is to convert undivided profits available at once for dividend, if the directors thought right, into capital assets of the company with a specific charge on them in favour of each shareholder for a specific amount not exercisable at the will of the shareholder, but only payable

(1) (1887) 12 App. Cas. 385.

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Scrutton L.J.

in future events depending on the company. When one comes to the question whether what Bishop Fisher received in that transaction is taxable for super tax, it appears to me that there are two questions which may be mixed up and which in *Blott's* case (1), I think, are mixed up. First of all, does the subject receive anything at all; secondly, if he does receive something does he receive it as income or profits of property, or is it the property itself which he receives? An instance of the second class of case is *Burrell's* case (2), where the company was being wound up, and what the shareholder received, though it was once undivided profits of the company, was in the winding up held to be the property being divided and therefore not income and not assessable to super tax. Another case is where what the shareholder receives though it was once undivided profits is being paid in reduction of capital, and there he receives something, but he is receiving capital and not income. A third case, perhaps, is the case which I put in my judgment in *Blott's* case (3), when that case was before this Court, of the owner of a ship, whose ship is lost, and who receives insurance money for more than the original value of the ship, but who receives it as capital, his property, and not as the income of his property. Those are cases where you do receive something, but do not receive it as income. But the language in *Blott's* case (1) of all the judges seems to waver between "You have not received anything at all," and "If you have received it you have received it as capital and not as income," and that may very well be so, because what was received in *Blott's* case (1) was certificates for shares, certificates showing that the recipient was entitled to certain shares in a company or to certain capital of the company. The stress of the argument for the Crown in this case has been laid on the words "capital" and "capitalize," and it has been said: How do you capitalize a thing by making a debt or issuing a security for a debt? By giving a man a security for a debt do you capitalize anything? You do not increase the capital of the company

(1) [1921] 2 A. C. 171. (2) [1924] 2 K. B. 52.
(3) [1920] 2 K. B. 657, 675.

by increasing the number of its creditors. It appears to me that, entirely disregarding the word "capitalize," the Crown are in a great difficulty if they have to face the question, what, here, did Bishop Fisher receive? He received nothing in the way of immediate cash, either capital or dividend, in the year of assessment. He received an acknowledgment or recognition by the company that if it had at the time property it would pay him something so many years hence, and would secure that payment by a charge on its assets, whatever it happened to have, and it might at the time when the sum became payable have none, and would pay interest until the time when the debt became payable. Now if one looks at *Blott's* case (1), one finds the judgments full of statements which tend to show that the recipient in *Blott's* case (1) received nothing, and that it was not a question whether he received it as income—he received nothing. Lord Haldane says (2): "His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where they were. The new shares simply confer a title to a larger proportion of the surplus assets, if and when a general distribution takes place, as in a winding up. In these assets the undistributed profits now allocated to capital will be included, profits which will be used by the company for its business but henceforth as part of its issued share capital." Lord Finlay says the same thing (3): "Instead of his getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business. How is it possible to treat any advantage accruing from this as a payment of income?" and Lord Finlay quotes the learned judge whom we are reversing in this case when in *Blott's* case (4) he said: "'Now I do not think that there is a payment of a dividend to a shareholder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it, and he takes it.'" I have been wondering whether when Rowlatt J. gave judgment in

(1) [1921] 2 A. C. 171.
(2) [1921] 2 A. C. 171, 184.
(3) [1921] 2 A. C. 171, 196.
(4) [1921] 2 A. C. 171, 194.

C. A. 1924

INLAND REVENUE COMMISSIONERS v. FISHER'S EXECUTORS.

Scrutton L.J.

this case he remembered what he had said in *Blott's* case (1), and how it was possible to say in this case that a part of the profits of the company was liberated to Bishop Fisher in the sense that the company parted with it and he took it. If Bishop Fisher had sold the debentures, the company would still have owed the debt to somebody. They would have parted with none of their assets. They would owe a debt in futuro to somebody, Bishop Fisher or somebody else. Lord Cave (2) says the same thing: "The resolution did not give to any shareholder a right to sue for the dividend in cash, his only right being to have an allotment of fully-paid shares in the capital of the company. The profits remained in the hands of the company as capital, and the shareholder received a paper certificate as evidence of his interest in the additional capital so set aside. The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets."

I have come to the conclusion that the real question in this case is, Did Bishop Fisher receive anything? and I cannot find, following the language of the noble Lords in *Blott's* case (3), that he did receive anything. What happened to the company was that whereas previously they had a reserve fund of undivided profits, that reserve fund to the extent of 357,500*l.* disappeared from their balance sheet and remained as capital assets available, no doubt, for their creditors, charged in favour of Bishop Fisher in future events with repayment if it still then existed, but nothing was received by Bishop Fisher except the acknowledgment of a debt; and that appears to me, in view of the language used by all the noble Lords in *Blott's* case (3), not to be the receipt of anything by the shareholders in the year of assessment, so that he could be taxed upon it. The case occurred to me which also occurred to my Brother Warrington. If you give a creditor, who has a debt payable five years hence, a charge for his debt, does he receive the debt in the year when you give him the charge, and, if he does, what would happen in

(1) [1921] 2 A. C. 171, 194. (2) [1921] 2 A. C. 171, 200.
(3) [1921] 2 A. C. 171.

the year when he does receive the debt? Will you be able to say in that year, "Oh, it is quite true you have received 100*l.* this year, but you received it five years before, when you got a charge for it"? I should have thought the answer was obvious, that you do not receive it in the year when the debtor gives you a charge for it, but you do receive it in the year in which it is paid. I desire to avoid the word "capitalize," except in the sense that undivided profits have ceased to be undivided profits available for dividend and have become what are ordinarily called capital assets, and I propose to decide this case on the lines that nothing has been received by Bishop Fisher in the year of assessment. I think the mistake, with great respect to my Brother Rowlatt, which he has made is in overlooking that consideration and in overlooking the test which he himself had applied when he gave his judgment in *Blott's* case. (1)

For these reasons, which I have expressed in my own words, I think the learned judge came to a wrong conclusion and this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1921] 2 A. C. 171.

W. I. C.

C. A.
1924
Oct. 17, 23.

[IN THE COURT OF APPEAL.]

LAPISH *v.* BRAITHWAITE.

[1923. L. 1293.]

Municipal Corporation—Councillor—Contract with Corporation—Share or Interest in Contract—Company—Managing Director—Share or Interest in Company—Penalty—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 41.

By s. 12, sub-s. 1, of the Municipal Corporations Act, 1882, a person is disqualified for being a councillor if and while he "has directly or indirectly . . . . any share or interest in any contract with . . . . the council": by sub-s. 2, a person shall not be disqualified, or be deemed to have any share or interest in such a contract "by reason only of his having any share or interest in . . . . any company . . . . under the Companies Act, 1862." By s. 41 of the Act if any person acts in a corporate office after becoming disqualified he is liable to a penalty.

An alderman of a municipal borough was the managing director of, as well as a shareholder in, a limited company which had a large contract for the supply of troughs and covers for troughs to be delivered during a year from the date thereof. While the contract was running he acted as a councillor of the borough. An action having been brought against him for penalties under s. 41:—

Held (by Bankes and Scrutton L.JJ., Atkin L.J. dissenting), that as managing director of the company, apart from being a shareholder therein, the defendant had not "directly or indirectly . . . . any share or interest" in the contract, within the meaning of s. 12, sub-s. 1; and was therefore not, as managing director and apart from being a shareholder, disqualified for being a councillor within that sub-section.

Held, further (by Scrutton L.J.), that if the defendant's position as managing director gave him a share or interest in the contract, it was "only a share or interest in a company under the Companies Act, 1862"; and therefore the disqualification was removed by sub-s. 2.

Per Atkin L.J., the defendant, as a shareholder in the company, had "directly or indirectly" a "share or interest" in the contract; Scrutton L.J. inclining to the contrary opinion.

Judgment of Bailhache J. reversed.

Appeal from the judgment of Bailhache J.

The plaintiff, a citizen of the City of Leeds, brought an action against the defendant to recover from him twelve penalties of 50*l.*, under s. 41 of the Municipal Corporations Act, 1882 (1), for attending a meeting of the Council of the City on

(1) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12, sub-s. 1. "A person shall be disqualified for being elected and for being a councillor, if and while he—

(*a*) Is an elective auditor or a

July 4, 1923, and for moving a resolution and voting on other resolutions as an alderman of the said city after becoming disqualified for being an alderman by s. 12, sub-s. 1 (*c*), of that Act, on the ground that he had a share or interest in certain contracts with the Council.

The following statement of facts is taken substantially from the written judgment of Atkin L.J.

The Lord Mayor, Aldermen and Citizens of the City of Leeds (hereinafter called "the Corporation") had contracts with four limited companies, the Leeds Sand and Gravel Co., Ld., Haulage (Leeds), Ld., B. Whitaker & Sons, Ld., and B. Whitaker & Sons (1923), Ld.

In the Leeds Sand and Gravel Co., Ld., the defendant was a shareholder and a director together with two other persons. B. Whitaker & Sons, Ld., held most of the shares in this company. In Haulage (Leeds), Ld., the defendant and his family held 2000 shares; three other shareholders held 3458 shares, and B. Whitaker & Sons, Ld., held 3500 shares. The defendant and the two other directors of the Leeds

---

revising assessor, or holds any office or place of profit, other than that of mayor or sheriff, in the gift or disposal of the council; or

(*b*) Is in holy orders, or the regular minister of a dissenting congregation; or

(*c*) Has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council:

Sub-s. 2. But a person shall not be so disqualified, or be deemed to have any share or interest in such a contract or employment, by reason only of his having any share or interest in—

(*a*) Any lease, sale, or purchase of land, or any agreement for the same; or

(*b*) Any agreement for the loan of money, or any security for the payment of money only; or

(*c*) Any newspaper in which any advertisement relating to the affairs of the borough or council is inserted; or

(*d*) Any company which contracts with the council for lighting or supplying with water or insuring against fire any part of the borough; or

(*e*) Any railway company, or any company incorporated by Act of Parliament or Royal Charter, or under the Companies Act, 1862.

Sect. 41, sub-s. 1: "If any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding 50*l*., recoverable by action."

C. A. 1924

LAPISH v. BRAITHWAITE.

Sand and Gravel Co., Ld., were the directors of Haulage (Leeds), Ld.

B. Whitaker & Sons, Ld., was a company with an issued capital of 3350 1*l.* preference shares and 3850 1*l.* ordinary shares. The defendant held 799 preference and 505 ordinary shares and was a director of the company, having as his colleagues the two other persons already mentioned. The company also carried on business as the Direct Coal and Lime Co.

B. Whitaker & Sons (1923), Ld., was incorporated in April, 1923. It had an issued capital of 125,000 preference and 100,000 ordinary shares. The defendant held 506 preference shares and, jointly with his two co-directors of the other companies, the whole of the ordinary shares, his beneficial interest being apparently about one-third. This company acquired the assets of the three companies above named and had the same three directors. The defendant was the managing director of all three companies.

There were four contracts between these companies and the Corporation :—

1. A contract dated February 20, 1923, with the Direct Coal and Lime Co., expressed to be a branch of B. Whitaker & Sons, Ld., for the supply of 15,000 tons of gas nuts between February 1 and July 30, 1923, at 1*l.* 4*s.* a ton.

2. A contract dated March 13, 1923, with the Leeds Sand and Gravel Co., Ld., expressed to be a branch of B. Whitaker & Sons, Ld., for the supply of 15,000 tons of clean washed gravel, and 10,000 tons of clean washed sand to be delivered over the next nine months at 8*s.* 6*d.* a ton.

3. A contract dated May 31, 1923, with B. Whitaker & Sons, Ld., for the supply of 7000 tons of clean sharp sand and 1000 tons of gravel to be delivered during the twelve months from April 1, 1923, at 9*s.* 4*d.* a ton.

4. A contract dated June 14, 1923, with B. Whitaker & Sons (1923), Ld., for the supply of 10,000 yards of $2\frac{3}{4}$ in. troughing at $4\frac{1}{2}d.$ a yard, and 30,000 yards of 4 in. troughing at $7\frac{1}{2}d.$ a yard, and 500,000 covers for troughs at 40*s.* per 1000 to be delivered during the twelve months from July 1, 1923.

The third contract alone appeared to have been made after tender. There was also a small contract for haulage the particulars of which were not stated.

By a resolution dated April 23, 1923, the defendant was appointed managing director of B. Whitaker & Sons (1923), Ld., at a salary of 2400*l.* a year. The provision for the remuneration of directors was No. 86 of the Articles of Association. It was in these terms :—

"The directors (other than a managing director) shall be paid out of the funds of the company remuneration for their services at the rate of 250*l.* per annum for each director. The directors shall also be paid in every year such further sum as they may by resolution determine not exceeding a sum equal to 5 per cent. of the net profits of the company available for distribution as dividend in such year after payment of the dividend on the preference shares, and such sum shall in default of a resolution of the directors to the contrary be divided between them in equal shares. The directors shall also be entitled to be paid their reasonable travelling and hotel and other expenses incurred in consequence of their attendance at board meetings, and otherwise in the execution of their duties as directors."

By art. 100: "The remuneration of a managing director shall from time to time be fixed by the board of directors and may be by way of fixed salary or commission on dividends, profits, or turnover of the company or of any other company in which the company is interested, or by participation in any such profits, or by all or any of these modes, and such remuneration may be either in addition to or in substitution for his remuneration as a director."

Bailhache J. held that as a shareholder in B. Whitaker & Sons (1923), Ld. the defendant would, by virtue of s. 12, sub-s. 1 (*c*), and apart from sub-s. 2 (*e*), have had indirectly an interest in the contracts above mentioned; and consequently would have been disqualified for being and liable for penalties for acting as a councillor; that by virtue of sub-s. 2 (*e*) his disqualification was removed in so far as he was only a shareholder in the company; but that inasmuch as being

C. A. 1924

LAPISH v. BRAITHWAITE.

the managing director he was more than a mere shareholder, sub-s. 2 (*e*) did not operate to remove the disqualification. The learned judge therefore gave judgment for the plaintiff for the nominal sum of 10*l*., which was all the plaintiff pressed for.

The defendant appealed.

W. A. Greene K.C., *Heckscher* and *Oldroyd* for the appellant. There is no question of bad faith here. The resolutions which the appellant moved and on which he voted did not concern the contracts with the companies of which he was the managing director, and the case turns solely on the construction of s. 12 of the Municipal Corporations Act, 1882. The origin of that section is s. 28 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), which provided that no clergyman or minister should be qualified to be a councillor or alderman, nor any person during such time as he should hold any office or place of profit, other than that of Mayor, in the gift of the council "or during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of such council; provided that no person shall be disqualified from being a councillor or alderman . . . . by reason of his being a proprietor or shareholder of any company which shall contract with the council of such borough for lighting or supplying with water or insuring against fire any part of such borough." The Municipal Corporation (Election) Act, 1869 (32 & 33 Vict. c. 55), granted further exemption from disqualification. By s. 5 no one was to be deemed to have an interest in a contract with by or on behalf of the council of a borough by reason only of his having "a share or interest in any railway company or in any company incorporated by Act of Parliament or by Royal Charter, or under the Companies Act, 1862." The Act of 1882 repealed both the earlier Acts and, by s. 12, added other exemptions from disqualification. Thus the policy of the later legislation has been rather to enable than to disqualify, and the Act of 1882 has gone further than some others in this direction.

For example, by s. 34 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), no member of a school board "shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of" the board; but there is excepted from this enactment any bargain or contract made with or work done by a company "in which such member holds shares." By r. 64 in Sch. II. to the Public Health Act, 1875 (38 & 39 Vict. c. 55), any member of a local board who is in any manner concerned in any bargain or contract entered into by the board, or participates in the profit thereof, or of any work done under the authority of the Act shall cease to be a member; but there is a proviso that he shall not vacate his office through being interested in any contract with the board "as a shareholder in any joint stock company." By s. 46, sub-s. 1, of the Local Government Act, 1894 (56 & 57 Vict. c. 73), a person is disqualified from being a member of a parish council or board of guardians if he is concerned in any bargain or contract entered into with the council or board, or participates in the profit of any such bargain or contract or of any work done under the authority of the council or board; provided that a person shall not be disqualified by reason of being interested in any contract with the council or board "as a shareholder in any joint stock company." It is plain therefore that when the Legislature intends to confer a special and exclusive exemption upon shareholders it uses appropriate language for that purpose. But the exempting words in s. 12, sub-s. 2, of the Municipal Corporations Act, 1882, are much wider. A person is not to be disqualified by reason only of his having "any share or interest in . . . . any company . . . . under the Companies Act, 1862." The question is what is meant by having "a share or interest," first, "in any contract with . . . . the council."

In *Nutton* v. *Wilson* (1) the defendant was a member of a local board which had made a contract with one Holdsworth, a plumber, for the supply of heating apparatus. Holdsworth employed the defendant, who was a joiner, to do certain work

(1) (1889) 22 Q. B. D. 744.

C. A. 1924

LAPISH v. BRAITHWAITE.

in connection with his contract with the local board. The board had also made a contract with one Brock for the erection of a water tank and meter house, and Brock had employed the defendant to put up certain door and window frames and provide timber for that purpose. It was held in the Court of Appeal that the defendant was "concerned in" both Holdsworth's contract and Brock's contract with the local board, within the meaning of r. 64 in Sch. II. to the Public Health Act, 1875, and was therefore disqualified from acting as a member of the board. The older cases of *Towsey* v. *White* (1) and *Tomkins* v. *Jolliffe* (2) are to the same effect. In *England* v. *Inglis* (3), a case under the section in question, the defendant was a member of a city council. He was also a jeweller and optician. The optician's business was managed by his son. The son in his own name made a contract with the education committee of the city council to supply spectacles for children in the council's schools. The business was done from the defendant's shop and in the defendant's time, and some of the cases for the spectacles were supplied out of his stock and at his expense, and bore his address. It was held the defendant had an interest in the contract arising out of the advertisement he obtained therefrom. These cases seem to indicate that a "share or interest in any contract" means some pecuniary or material interest.

The learned judge has held that the words include such an interest as a managing director has by virtue of his office in the contracts of his company, apart from any interest he may have as a shareholder. If so where is the line to be drawn? Has the secretary of a gas company an interest in contracts for the supply of gas to a municipal corporation? Or a typist in the secretary's office, or the hall porter at the company's show room; or a collier working in the mine that supplies the coal to make the gas? Considerations of this kind led McCardie J. in *Everett* v. *Griffiths* (4) to express the view that if the defendant in that case, who was the chairman of a board of guardians, had been the general manager of the company

(1) (1826) 5 B. & C. 125.
(2) (1887) 51 J. P. 247.
(3) [1920] 2 K. B. 636.
(4) [1924] 1 K. B. 941, 950.

which had contracted to supply the guardians with milk, he would not have been "concerned" in the contract within the meaning of s. 46, sub-s. 1, of the Local Government Act, 1894. There the defendant was in fact the foreman or manager of a wheelwright's shop which the dairy company had in connection with their distribution of milk. He also held one 1*l.* share in the company. The learned judge held that the defendant, apart from his being a shareholder in the company, was not "concerned" in the contract within the meaning of the statute. If that case was rightly decided it should entitle the appellant to succeed, for if he is not disqualified except as being a shareholder he is not disqualified at all, his disqualification as a shareholder being removed by sub-s. 2.

Assuming however that by s. 12, sub-s. 1 (*c*), the share or interest which the managing director has in the contracts made by the company would disqualify him from being a councillor of the corporation with which any of the contracts were made, the next questions are: (1.) the meaning of the words "share or interest in . . . . any company" in sub-s. 2 (*e*), and (2.) their effect in removing this disqualification, inasmuch as the appellant's only interest in the contracts was through his share or interest in the companies. The learned judge, it is submitted, was wrong in holding that the appellant had more than a share or interest in the companies, merely because he filled the office of managing director as well as being a shareholder director. A shareholder has a share or interest in a company; so has a debenture holder: if a shareholder in the company may be a councillor of a corporation contracting with the company, he does not become disqualified by becoming a debenture holder; because by becoming a debenture holder he only acquires a share or interest in the company, and that does not disqualify him. It cannot be said that if a man holds one share or interest in a company he may be a councillor of the corporation contracting, but that if he acquires another he is disqualified. Admitting that an actuary of a company, or the secretary of a company, has a share or interest in the company, and might be a councillor of the corporation; according to the

C. A. 1924

LAPISH v. BRAITHWAITE.

judgment under appeal, if he is also a shareholder he is disqualified. But a share or interest in a company does not disqualify, be it greater or less. The learned judge has diverted his mind from "share or interest in a company" to share or "interest in a contract," and because a managing director has a share or interest in the contracts of the company in addition to his interest as a shareholder, therefore he has held that as a shareholder he may be, but if he is the managing director also be cannot be, a councillor of the contracting corporation. But sub-s. 2 removes the disqualification of sub-s. 1 from shareholders, debenture holders, directors, officers, in short from the whole company family whose only share or interest in the contracts consists in their share or interest in the company. If any of them has any further share or interest in the contracts, apart from his share or interest in the company—for example, as a guarantor of their performance, or as a sub-contractor—he will be disqualified by sub-s. 1, but so long as his share or interest in the company is his only share or interest in the contracts, he is exempted from disqualification by sub-s. 2.

Mortimer K.C., *T. P. Perks* and *G. Russell Vick* for the respondent. The object of s. 12 of the Municipal Corporations Act, 1882, like that of s. 34 of the Elementary Education Act, 1870; Sch. II., r. 64, of the Public Health Act, 1875; and s. 46, sub-s. 1, of the Local Government Act, 1894; is "to prevent the conflict between interest and duty that might otherwise inevitably arise": *Nutton* v. *Wilson* (1); *Barnacle* v. *Clark*. (2) In each of those three enactments the interest of a shareholder is the only interest which a person may hold in a contracting company without being disqualified from being a member of the body or board contracting with the company. Why should a greater latitude be allowed to a councillor of a municipal corporation than to a member of a school board, a local board, or a parish council? The expression "share or interest" means neither more nor less than the interest of a shareholder, or of a stockholder where the company's capital consists of stock and not of shares. The reason why those

(1) 22 Q. B. D. 744, 748. (2) [1900] 1 Q. B. 279.

words, which were first used in the Municipal Corporation (Election) Act, 1869, appear in s. 12 of the Act of 1882, instead of the word "share," is that "share or interest" is used in ss. 22 and 24 of the Companies Act, 1862, to describe the interest of what is commonly known as a shareholder. The same expression is used in s. 4 of the Public Health (Members and Officers) Act, 1885 (48 & 49 Vict. c. 54), which provides that no member of a local authority shall vacate his office "by reason only of his having any share or interest in any newspaper" as there described. It is used twice in s. 12 of the Municipal Corporations Act, 1882, once in sub-s. 1 (*c*), the disqualifying clause, where the words are "share or interest in any contract or employment," and again in sub-s. 2, the exempting clause, which speaks of "any share or interest in any company." "Share or interest in any contract" has been held to mean a pecuniary or material interest: *England* v. *Inglis* (1); and the context indicates that it means such a share or interest as a partner, shareholder, or stockholder may have. That is the only share or interest in any company contracting with a municipal corporation which a councillor may have without being disqualified. There can be no doubt that, apart from s. 12, sub-s. 2, a shareholder in a company would have been within the mischief that sub-s. 1 was intended to remedy. The effect of s. 12, sub-s. 2, is to qualify a person who would otherwise be disqualified by reason only of his being a shareholder: *Todd* v. *Robinson* (2), per Brett M.R.; but the only qualification restored is that which he lost by being a shareholder. If he has any further interest his disqualification remains. It cannot be argued that a managing director has no further share or interest than a shareholder has in the contracts of the company. The recommending, supervising, and approving of the contracts and their performance would all fall upon him, and his duty to the company of which he was the managing director and his duty to the corporation of which he was a councillor must frequently conflict. Moreover in the present case by No. 100 of the Articles of Association of B. Whitaker & Sons (1923), Ld.,

(1) [1920] 2 K. B. 636. (2) (1884) 14 Q. B. D. 739, 745.

C. A. 1924

LAPISH v. BRAITHWAITE.

his salary as managing director might in any year depend on the profits earned by that company.

Greene K.C. in reply. In point of fact the appellant's salary was a fixed annual sum. The Court will have regard to the actual facts and not to possibilities in adjudicating on a charge involving penalties. The argument for the respondent involves reading " share or interest " as " interest of a shareholder " in sub-s. 2 of s. 12, and as including an interest other than that of a shareholder in sub-s. 1 ; and the result of it is to qualify one who has a direct interest in the contracts as a shareholder, and to disqualify him because of his indirect interest as managing director.

Cur. adv. vult.

Oct. 23. The following written judgments were delivered:—

BANKES L.J. This appeal raises a short but important point of construction of one section of an Act of Parliament. The Act is the Municipal Corporations Act, 1882, and the section is s. 12.

The case for the plaintiff in the Court below was that the defendant (the present appellant) was by virtue of the provisions of that section disqualified from being an alderman of the City of Leeds, and that while so disqualified he had acted as such, and had consequently rendered himself liable to a fine which the plaintiff sought to recover in the action. The learned judge who tried the action decided in the plaintiff's favour. It is unnecessary to go into the facts of the case in detail. For the purpose of deciding this appeal it is sufficient to summarize them.

At all material times the appellant was an alderman of the City of Leeds, and he was also managing director of, and a large shareholder in, a limited liability company carrying on business at Leeds. This company had a capital of 250,000*l*. It did an extensive business, and it had a contract with the Corporation of Leeds for the supply of a large quantity of earthenware goods, which contract was running at the time when the appellant is alleged to have acted as alderman although disqualified. The only evidence that the appellant

took any active part in reference to the making of the contract consisted in the fact that he was one of the two directors of the company who signed the document as witnesses to the affixing of the company's seal. The correspondence which led up to the contract was conducted by the secretary of the company. The appellant was paid a fixed salary as managing director.

The question is whether upon these facts the case falls within the section. The section is divided into two portions, a disqualifying portion, sub-s. 1, and an exempting portion, sub-s. 2. The material portions of the section are as follows. It is s. 12, sub-s. 1 (*c*): "A person shall be disqualified for being elected and for being a councillor, if and while he . . . . has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the Council." Then sub-s. 2: "But a person shall not be so disqualified, or be deemed to have any share or interest in such a contract or employment, by reason only of his having any share or interest in (*a*) any lease, sale or purchase of land, or any agreement for the same; or (*b*) any agreement for the loan of money, or any security for the payment of money only; or (*c*) any newspaper in which any advertisement relating to the affairs of the borough or council is inserted; or (*d*) any company which contracts with the council for lighting or supplying with water or insuring against fire any part of the borough; or (*e*) any railway company, or any company incorporated by Act of Parliament or Royal Charter, or under the Companies Act, 1862."

There is no doubt as to the intention of the Legislature in framing this section. It was to secure as far as was thought necessary that aldermen and councillors should not place themselves in positions in which their duty and their interest conflicted, and to remove a possible source of temptation. Our attention has been called to a number of statutes containing provisions introduced for a similar purpose. It is not necessary in my opinion to refer to the particular language used in these statutes, as it throws no light upon the question which we have to decide. We were also referred to the statutes of

C. A. 1924

LAPISH v. BRAITHWAITE.

Bankes L.J.

1835 (5 & 6 Will. 4, c. 76), s. 28, and of 1869 (6 & 7 Vict. c. 18), s. 5, which were repealed and replaced by the Municipal Corporations Act, 1882. It is, I think, material to consider these sections a little closely. In the first place they are drafted on the same lines as s. 12 of the Act of 1882; that is to say the nature of the disqualification is laid down in general language, followed by a definition which takes the form of an exclusion from that general language of certain specified conditions. In the Act of 1835 the provision is that the disqualification of councillor or alderman shall be during such time as he shall have, directly or indirectly, any share or interest in any contract with, by, or on behalf of the council, followed by words of exclusion in the shape of a proviso that no person shall be disqualified by reason of his being a proprietor or shareholder of any company which shall contract with the council of the borough for lighting or supplying with water or insuring against fire any part of the borough. The Act of 1869 which increased the number and scope of the exemptions took a somewhat different shape. There the draftsman adopted the form of providing that the further exempted conditions should not be deemed to constitute an interest in a contract or employment by, with, or on behalf of the council. This form is followed in the Act of 1882. It is material to notice with regard to the earlier legislation, and with regard also to the Act of 1882, that the Legislature was not tightening up the disqualification. On the contrary, it was always increasing the exemptions. The necessary inference from the historical survey of the legislation seems to be that the Legislature recognized that having regard to municipal life, to the importance of securing the services of the prominent persons in a municipality as members of the local authority, to the conditions affecting businesses and business people in the municipalities, it was necessary, in spite of the opportunities which might be given for malpractices, to relax to a very considerable extent the stringency of the original disqualifying provisions. It is with these views in mind that I approach the consideration of the material section.

So far as sub-s. 1 is concerned it is clear that this is a penal section, and as such must receive the construction which has always been applied to such provisions. If the appellant's case does not fall within the language of sub-s. 1 there is an end of the matter, and it is unnecessary to consider whether sub-s. 2 applies.

I desire to confine my decision to the particular facts of this case, that is to say, to the case of a person who is an alderman or councillor, and who is also a shareholder in, and the managing director at a fixed salary of a very substantial company which has a contract with the council of which he is a member, there being no evidence that the managing director took any active part in the negotiation, preparation, or supervision of the performance of the contract, beyond that which a managing director might be presumed to take in the ordinary discharge of his duties. In dealing with the language of the sub-section, it is material to bear in mind that the disqualifying portion is an exact reproduction of the original statute of 1835. In the absence of a clear indication to the contrary, one would assume that the Legislature in reproducing that language in the Act of 1882 did not intend to create any fresh ground of disqualification. The exempting proviso in the Act of 1835 exempted from disqualification persons who otherwise " by reason of " being proprietors or shareholders of a company contracting to supply a council with light or water, or insuring against fire, would have been disqualified. I cannot read the language of this statute as being aimed at or as including the officials or servants of companies, or partnerships, or persons employed by individuals, who are paid a fixed salary and whose only concern with contracts made between their employers and the council of which they were members, was that in discharge of their duty to their employers they negotiated or concluded, or superintended the carrying out of such contracts. The Act of 1869 did not in my opinion create any fresh ground of disqualification. On the contrary it extended the exemption to persons having a share or interest in railway companies, companies incorporated by Act of Parliament or Royal

C. A. 1924

LAPISH v. BRAITHWAITE.

Bankes L.J.

charter or under the Companies Act, 1862. It is true that the draftsman adopted a different form for creating the exemption from that adopted in the earlier statute, and he added the word "only" to the words "by reason of." I cannot read the addition of the word "only," appearing as it does in an extension of the exemption clause, as creating any new ground of disqualification, or as intended to draw any distinction between the officials and servants of the companies mentioned in the earlier Act, and those mentioned in this Act.

I pass now to a closer examination of the language of the material section of the Act of 1882. In my opinion the expressions "share" or "interest" in sub-s. 1 (*c*) are not synonymous terms. The expression "interest" is introduced in contradistinction to "share." A managing director who is also a shareholder has indirectly an interest in the contract made between his company and a council because he is a shareholder. As managing director merely he has no share in the contract. Has he an interest in the contract? On the one hand it is said that if the answer is in the negative, the door is opened to just the sort of influences which it is the object of the statute to remove. On the other hand, it is said that if you construe "interest" in a contract as including the part which a managing director plays in relation to the contract, where are you going to stop, and where can you draw the line? Every responsible official of the company who has been concerned in the negotiating or drafting of the contract, or in supervising the carrying of it out after it has been made, has just as much an interest in that sense in the contract as the managing director, and very possibly a greater interest.

Again is the disqualification to depend upon the part which the managing director or other salaried official in fact took in negotiating, concluding, or supervising the fulfilment of the contract, or is it to be sufficient that he had the opportunity of doing any or all of these things? Two of the decisions which have been cited to the Court are of some assistance in interpreting the language of the

section, though the facts in each of the cases are very different. In *England* v. *Inglis* (1) the question was whether the defendant had any interest in contracts made by his son for spectacles to be supplied by the son to the municipal corporation, of which the defendant was a councillor. The county court judge before whom the action was tried held that to bring the father within the statute his interest in the contract must be something more than a sentimental interest, such as a father may have in the prosperity of a son; it must be a pecuniary or material interest. The Divisional Court, consisting of Salter and Roche JJ., approved of this ruling, and so far as it goes I entirely agree with their decision. The decision however leaves undecided the question what constitutes a material interest. In *Everett* v. *Griffiths* (2) McCardie J. carried the matter a little further. The question before him arose in reference to the provisions of s. 46, sub-s. 1, of the Local Government Act, 1894, which disqualifies a councillor who is "concerned" in a contract entered into with the council of which he is a member, or who participates in the profit of any such contract. The defendant was the chairman of the Islington Guardians, and the manager of a joint stock company who had a contract with the Guardians for the supply of milk. McCardie J. expresses his view as follows (3): "The conclusion of the matter is that the decisions have gone far, but in my opinion the words in the decisions upon s. 46 of the Local Government Act, 1894, and the other Act do not go far enough to show that the defendant here, on the facts I have found, was 'concerned in' or 'participated in' the profits of the contracts between the Board and the defendant's employers—i.e., apart from his being a shareholder in the Farmers' Company as hereafter mentioned. If I could have found that the defendant arranged for any bonus or commission on any of the contracts or had made any arrangement whatsoever for any pecuniary participation, however cleverly concealed, I should have decided

(1) [1920] 2 K. B. 636.

(2) [1924] 1 K. B. 941.

(3) [1924] 1 K. B. 949.

C. A. 1924

LAPISH v. BRAITHWAITE.

Bankes L.J.

against him. In some respects I regret the conclusion I have reached. The fact that the defendant was chairman of the Islington Board of Guardians might well tend to stabilise his position with the Farmers and Cleveland Dairies Company, Ld., his employers. The risks of dismissal would be less. The chances of promotion would be greater. His claim for a pension, if made, might receive more favourable consideration. His request for a rise in wages might be more genially regarded. The indirect advantages might be many. There is no evidence here however that any of them has been sought for or granted. I am aware that the decision I now give may be just as applicable if the defendant had been general manager of the Farmers' Company, and I realize the weight of that point. If Parliament wishes to hit such a case as the present the legislation must be strengthened." I cannot myself see any material distinction between being "concerned" in a contract and being "interested" in a contract if "interested" is to be interpreted in the sense contended for by the respondent. In my opinion the view taken by McCardie J. is the correct one. I do not think the expression "interest in a contract," as used first of all in the Municipal Corporations Act, 1835, and reproduced in s. 12, sub-s. 1, of the Act of 1882, includes such an interest as a paid official of an incorporated company necessarily takes in a contract by reason of the fact that it was part of his duty to make the contract and to superintend the execution of it, and that as such paid official he is interested in the success of the company; and for this purpose I cannot draw a distinction between a managing director and any other salaried official whose duties may require him to make and supervise contracts on behalf of his principal. To adopt the view of the statute contended for by the respondent is to adopt a construction the result of which is that the Legislature has exempted the appellant from disqualification in respect of his real and substantial interest in the company and in the contract which arises from the fact of his being a large shareholder, and has disqualified him for a less real and substantial interest

in the contract which arises from the fact of his being managing director. I agree with the view expressed by McCardie J. that if the Legislature intend to include the case of the managing director and the paid official they should do so by more explicit language than has hitherto been used.

If the above view is correct it disposes of the appeal, because if the case does not fall within the disqualifying portion of the section the question does not arise whether it falls within the exemption portion. On this second point, if it arises, one question is whether the Legislature has used the expression "share or interest" in the same sense when speaking of a share or interest in a contract under s. 12, sub-s. 1 (*c*), as they have when speaking of a share or interest in a company under s. 12, sub-s. 2 (*e*). It is part of the respondent's case that "share or interest" in a company is used in the sense of proprietary share or interest. I cannot bring myself to think that the Legislature in the language used in the two sub-sections intended that a different meaning should be attributed to "share or interest" in the one sub-section to what is attributed to the same expression in the other; nor do I see anything in the context, or in the language of the two sub-sections, which could lead me to put two different constructions upon the same expression. Assuming therefore, but without deciding, that the view contended for by the respondent as to the meaning of the expression in the second sub-section is correct, then if the same meaning is given to the expression in the first sub-section the appellant succeeds, because he does not come within the disqualifying portion of the section.

With respect to the opinion of a learned judge whose opinion is entitled to great respect and whose death we all deplore, I cannot agree with his construction of the statute. In my opinion the appeal succeeds; the judgment for the plaintiff must be set aside and entered for the defendant with costs of the action as between solicitor and client and of the appeal as between party and party.

In conclusion I desire to say that my decision must be

C. A. 1924

LAPISH v. BRAITHWAITE.

confined to cases where the facts are similar to the present case and where no charge whatever of misconduct or bad faith is made against the councillor or alderman.

SCRUTTON L.J. James B. Lapish brings against Albert Braithwaite an action claiming the fine or penalty prescribed by s. 41 of the Municipal Corporations Act, 1882, for the offence of acting as an alderman of the City of Leeds at a time when he was disqualified from so acting, because he had at that time an interest in a contract with the Leeds Corporation contrary to s. 12 of the Act of 1882.

This is obviously a penal action and the plaintiff must prove his case strictly. He proves that Braithwaite was the managing director and a large shareholder in a company called B. Whitaker & Sons (1923), Ld., which had at the time of the votes complained of a contract with the Corporation of Leeds for the supply of certain troughing. I take this as a sample of other similar companies and contracts which are referred to in detail in the judgment of Atkin L.J. The question appears to be the same in each contract. It is proved that, while the company by its directors might vote the managing director a salary varying with profits earned, they had not done so at the time of the voting, his salary being then fixed at 2400*l.* per annum.

Do these facts give Braithwaite a "share or interest" in the company's contract? Bailhache J. has held that they do give Braithwaite an interest in the contract. Braithwaite appeals, and the appeal is said, probably rightly, to affect a large number of corporators who are shareholders and officers of companies having contracts with the corporations of which they are members.

The prohibition against corporators having a "share or interest" in a contract with their corporation first appears in the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 28, accompanied by a proviso that the disqualification shall not apply to shareholders in a limited class of companies, those lighting, supplying with water, or insuring against fire, any part of the borough. At that time companies were in

their infancy, and the "one man company" was unknown. Shortly after the Companies Act of 1862, by the Act of 1869 (32 & 33 Vict. c. 55), s. 5, the proviso was extended to all limited companies, and this is repeated in the Act of 1882, the relevant Act for the present purpose. Sect. 12 disqualifies a corporator who has "directly or indirectly by himself or his partner any share or interest in any contract or employment with by or on behalf of the Council," but goes on to provide that a person shall not be disqualified "or be deemed to have any share or interest in such a contract or employment . . . . by reason only of his having any share or interest" in any company incorporated under the Companies Act, 1862.

Considering that an offence is being created, the words "direct or indirect share or interest" are singularly unfortunate. What is an indirect interest in a contract which will render the corporator liable to a penalty? Every servant of a company is interested in the success of the company which pays him his salary. Has he therefore an indirect interest in the contract of the company which employs him and pays him, especially in cases where it is his duty to assist in performing those contracts? The organization of labour has placed in offices of municipal dignity men performing comparatively humble duties in the service of companies. Has a Labour Mayor who is a signalman of a railway company an indirect interest in that railway company's contracts with his corporation, which he helps to perform? If only some employees of the company concerned in the contract have an indirect interest in it, how is the line to be drawn between those who have and those who have not such an interest? The cases in which an indirect interest has been found are of these classes: cases where the corporator was the cestui que trust of the person contracting with the council; cases where the corporator was an assignee of the contractor with the council: *Hunnings* v. *Williamson* (1); cases where the corporator contracted with a person as principal, who was an agent or representative of the council: *Cox* v. *Truscott* (2);

(1) (1883) 11 Q. B. D. 533. (2) (1905) 92 L. T. 650.

C. A. 1924

LAPISH v. BRAITHWAITE.

Scrutton L.J.

Tanfield v. *Reynolds*. (1) If the corporator were an undisclosed principal, he would have, of course, a share or direct interest in the contract. The cases that go furthest are the cases of the corporator sub-contractor who contracts with the contractor, not with the council, to carry out part of the work which the contractor has agreed with the council to perform: *Barnacle* v. *Clark* (2); *Tomkins* v. *Jolliffe* (3); contra, *Le Feuvre* v. *Lankester* (4); and the case of *England* v. *Inglis* (5), in which a son contracted in his own name to supply spectacles for children to the council; he carried out the work from his father's shop, giving that address, and his father paid the establishment expenses, taking into account that he might get benefit from the advertisement of his business. In that case the county court judge found there was an indirect interest, and a Divisional Court declined to disturb his finding. They said, however, that the interest must be of a pecuniary nature, not a sentimental one, such as a father's desire that his son should get on.

I should myself have been disposed to think that the words "share or interest" were limited to benefits flowing from the contract by a tie of law, whether directly or through another person. This would cover the case of the assignee, the cestui que trust, the contract with a representative of the council, the undisclosed principal. I should doubt in a penal statute the extension to a sub-contractor, or a volunteer assistant. It is clear that Parliament did not think the interest, whatever it was, of a shareholder, who would be the ultimate recipient of any profits from the contract, an indirect interest which would impose disqualification. He was "not to be deemed to have any share or interest in the contract." When in *Todd* v. *Robinson* (6), under s. 193 of the Public Health Act, 1875 (which prohibited officers of the council from being "concerned or interested" in a contract with their council, but did not contain any proviso in favour of shareholders), this Court held that a shareholder had an indirect interest in a contract

(1) (1875) 39 J. P. 293.
(2) [1900] 1 Q. B. 279.
(3) 51 J. P. 247.
(4) (1854) 3 E. & B. 530.
(5) [1920] 2 K. B. 636.
(6) 14 Q. B. D. 739.

with his company, Parliament immediately showed their view of the matter by providing in an Act of 1885 (48 & 49 Vict. c. 53), s. 2, that the position of an officer as a shareholder in a joint stock company contracting with the council was not to render him liable under the section in question.

I am not satisfied that a shareholder has an "indirect interest" in the contracts of the company within the meaning of the words "share or interest." I am inclined to think that, when Parliament enacted that he was not to be deemed to have such an interest, they showed the limited meaning they intended the words to bear. A man may be interested in a thing, without having an interest in it.

But in any event I cannot think that the relation of an employee paid by fixed salary to his company involves an interest, even indirect, in the contracts made by his company within the meaning of a penal statute, even if he takes part in negotiating or performing those contracts.

If it is an interest in the contract, prima facie disqualifying him, I should have thought that a fortiori it was an interest in the company bringing him within the proviso excepting him. It is difficult to believe that Parliament would use the words "share or interest" twice in four lines in two different senses, first in a wide and vague general sense, secondly in a limited legal sense. A man is only indirectly interested in the contracts of his company because he is interested in the company of which he is an employee or shareholder. If because of this he has indirectly an interest in the contracts, still more has he an interest in the company, which excuses him. I am assisted to this conclusion by the consideration that in a penal action any doubtful matter is decided in favour of the defendant. Illustrations of this in this Court will be found in the case of *Tuck & Sons* v. *Priester* (1), where Lord Esher, speaking of "the settled rule for the construction of penal statutes," uses these words: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction.

(1) (1887) 19 Q. B. D. 629, 638.

C. A. 1924

LAPISH v. BRAITHWAITE.

Scrutton L.J.

If there are two reasonable constructions we must give the more lenient one." Lindley L.J. uses similar language (1): "Having regard to the well settled rule that the Court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it, I think we ought to keep on the safe side and say that the words 'unlawfully made' are sufficiently ambiguous to enable the defendant to escape from the penalty which is imposed by s. 6." This rule has been repeatedly followed by this Court in applying statutes imposing penalties.

Generally I desire to say that I have dealt with this matter simply as a question of construction of statutory provisions imposing penalties. I am not able to extract from the statutory provisions any clear principle of "purity in local administration" which should control the interpretation of the words even against a defendant sued for a penalty. I do not understand what Parliament meant when they prohibited the partner of a person having a contract with the corporation from being a corporator, but allowed as a corporator or officer of a corporation a shareholder however large in a company having a contract with the corporation. I note that Parliament allowed a person pecuniarily interested in matters necessarily discussed by the corporation to be a corporator, so long as he did not vote on matters in which he had a pecuniary interest. It is not suggested here that the defendant as a corporator voted on any matter affecting this contract. Not being able to see any clear indication of principle in the legislation, I have recourse to the principle that a statute creating an offence punishable by penalties must do so in clear language.

There is in the case of judges a common law rule against adjudicating in matters in which they have any pecuniary interest; there is no such common law rule as to the exercise of administrative functions. But the attention of Parliament may well be called to the question of so-called "one man companies" and their use in enabling people to do indirectly

(1) 19 Q. B. D. 645.

what they could not do directly. Undischarged bankrupts appear, or rather do not appear, holding practically all the shares in companies with high sounding names; and it may well be that corporators in effect contract with their corporation through companies in which they have substantially all the interest. This is allowed at present; it appears to be within the mischief aimed at by the disqualification provisions. I do not disregard the difficulty of the question. It would seem absurd to disqualify a corporator because his corporation bought soap from Levers, or tyres from Dunlops, or stationery from Harrods, in which companies the corporator had some preference shares, though he did not vote on any of these purchases. Where is the line to be drawn? Anyhow, it may be that Parliament, which allows railway directors to vote on matters affecting their railways and trade union officials on matters affecting their unions, will feel a difficulty in applying a stricter rule to others than it applies to its own proceedings, but the growth of "one man companies" with its effects certainly requires the attention of Parliament.

I understand the reasoning of Bailhache J.'s judgment to be that, as the proviso to s. 12 only excuses a corporator "by reason only of his having a share or interest in a company," if that corporator is found not only with a share and interest in the contract as a shareholder in the company, but also negotiating and performing the contract, his shareholding no longer excuses him, but is added to the weight of his managing directorship to make an interest in the contract. I should reply that two things neither of which in my view is an interest in the contract do not when added make an interest in the contract; or, to put it in another way, that if his managing directorship is an interest in the contract, which prima facie disqualifies him, still more is it an interest in the company, which finally excuses him. For these reasons I am of opinion that the appeal should be allowed and entered for the defendant with costs on the ground that the present statutory provisions do not expose him to penalties. Whether they should be made more stringent is a matter for Parliament, not for this Court.

C. A. 1924

LAPISH v. BRAITHWAITE.

ATKIN L.J. This is an action brought by the plaintiff, a citizen of the City of Leeds, against the defendant, an alderman of the said city, to recover fines imposed by s. 41 of the Municipal Corporations Act, 1882, for having acted as such after being disqualified. The disqualification alleged is that the defendant had a share or interest in contracts with the corporation. The defendant's answer is that if he had such a share or interest it arose only by reason of his share or interest in a limited company; and that therefore no disqualification arose. The case turns upon the construction of s. 12 of the Municipal Corporations Act, 1882, which has been read. The section consists of two sub-sections, one a disqualifying clause in general terms, the other an exception or protecting clause. The first question is whether the defendant comes within the disqualifying clause. To ascertain this it is necessary to consider the facts. [The Lord Justice stated the facts set out above and continued:] It thus appears that within a period of four months the companies in question obtained contracts for continuous performance representing a turnover of approximately 34,000*l*. The appellant was, as I have said, the managing director of all the companies, but inasmuch as they were all merged in B. Whitaker & Sons (1923), Ld., the important matter is his position in that company. I presume that the duties of the managing director in such a company would include obtaining or supervising the obtaining of contracts for the company, and supervision of their fulfilment; and I have little doubt that the attention to those contracts with the Leeds Corporation, substantial as they were in amount, would be an important part of the duty of the managing director.

Had Alderman Braithwaite a share or interest in these contracts? I have no doubt myself that he had, if only as a shareholder. That a shareholder in a company has an interest in a suit in which the company is litigant was decided in *Dimes* v. *Proprietors of the Grand Junction Canal* (1), where a decree of Lord Cottenham L.C. was set aside on the ground that the Lord Chancellor was a shareholder in the Canal

(1) (1852) 3 H. L. C. 759.

Corporation. Indeed if a shareholder is not within the disqualifying words it seems difficult to explain why protection should be given in the case of particular companies beginning with lighting, water, and fire insurance companies in the Municipal Corporations Act, 1835. The interest of a shareholder in the company party to a contract appears to me to give him an interest direct or indirect in the contract within the words of the disqualifying clause. But it appears to me that the defendant had also a further interest in addition to that arising from his position as shareholder. As managing director it was his duty both to obtain and to supervise the performance of these contracts. He was paid to perform this very work; and it was his duty to his company to obtain the most favourable terms he could for the company; and to see that the performance was in accordance with the contract; and if necessity arose to obtain such relaxations from the other contracting party as he could. If he succeeded in making the contracts profitable, he had a practical expectation as a director of receiving the increased remuneration limited to a percentage of the profits provided for by art. 86. Such a position appears to me to be within the ordinary meaning of the word "interest" in the context in which it is used. If the defendant had covenanted not to be interested in such a business as B. Whitaker & Sons (1923), Ld., and the facts mentioned were proved without any shareholding, I conceive that the covenant would be held to be broken. The interest is a substantial, material, commercial interest, and I see no reason at all to limit the word in the section to an interest which involves participation in the profits or gains. The section is undoubtedly passed to secure public advantages of the highest importance, as to which I will say something later. I agree that it is penal and the disqualification must be clearly expressed. But the mischief to be remedied is one of the considerations to be taken into account in construing such a section; and taking the section as a whole I think that the facts in this case disclose an interest additional to and different from that arising from the position of shareholder.

C. A. 1924

LAPISH v. BRAITHWAITE.

Atkin L.J.

Holding therefore that the defendant had an interest in the contracts as above stated, I have next to inquire whether he comes within the protective clause. It has been argued that the words "share or interest" in the protective clause are the words used in the disqualifying clause; and that they must necessarily have the same meaning. I cannot agree. It will be found that some of the protective provisions refer to "share or interest" in the subject matter of the contract, while others refer to "share or interest" in a contracting firm or corporation. "Share" in a contract has not the same meaning as "share" in a corporation which makes a contract; and so with "interest." The protective clause itself is a reproduction of various protective clauses to be found in previous Acts. Thus s. 12, sub-s. 2 (*a*) and (*b*), are to be found in s. 7 of the Municipal Corporations Act, 1842 (5 & 6 Vict. c. 104), sub-s. 2 (*c*), in s. 1 of the Act of 1852 (15 & 16 Vict. c. 5), while (*d*) is in substance the protection given in the original Act of 1835, and (*e*) comes from s. 5 of the Municipal (Election) Act, 1869. The words "share or interest" in a limited company come from the Act of 1869, which extended the protection given to persons interested in contracts relating to water, lighting, and fire insurance by the Act of 1835 to the case of railway companies and limited companies. It is to be noticed that the protection given in the case of water, light, and fire insurance companies was by the original Act of 1835 limited to a disqualification arising by reason of a person being a shareholder. It seems to me that the true view of the Act of 1869 was to put railway shareholders and shareholders in limited companies in the same position as shareholders mentioned in the Act of 1835. I cannot think that a larger measure of relief was intended to be given in respect of such companies than had been given in the original case of light and water companies; a protection which remained unaffected until the Act of 1883, if indeed it has been affected at all. In this respect I think that s. 12 of the Act of 1882 was merely a codifying section and not intended to have an

amending operation. If one had to surmise why in 1869 the draftsman used the words "share or interest" in a company rather than the words "being a shareholder" in a company, it may well be that his attention had been drawn to the collocation in the Companies Act, 1862, of share and interest of a member in ss. 22 and 24, and to the fact that under that Act a member's interest might be represented by stock; or might consist only of liability on a guarantee in the case of a company limited by guarantee. It seems to me that the words are accurately explained, as suggested by Mr. Perks in his argument, as being a proprietary right, such as a share or interest similar to a share. In other words they were intended to give no further substantial relief than that given by the Act of 1835 to a shareholder. In coming to this conclusion I am fortified by the fact that in, I believe, all similar statutory provisions, s. 35 of the Elementary Education Act, 1870, Sch. II., r. 64, of the Public Health Act, 1875, s. 46, sub-s. 2, of the Local Government Act, 1894, the protection is limited to disqualification arising by reason of being interested as a shareholder. Why a member of a corporation should have a larger measure of protection I cannot understand, and I do not think that the Legislature ever so intended. I may add that a person may have an interest in a contract derived from a company without having any interest in the company, as for instance if the company had assigned to him the contract or a definite share of it, or had given him a charge on it. I apprehend that the creditor of a company with a specific charge on one of its contracts may have an interest in the contract without having an interest in the company. So I think that the managing director of a company whose duty it is to make and execute a contract with the practical expectation of receiving an additional remuneration commensurate with the profits to be made from performance of the contract has an interest in the contract without having as director an interest in the company. I cannot see that the relation to the company or the contract of the managing

C. A. 1924

LAPISH v. BRAITHWAITE.

Atkin L.J.

director or of any director in this respect can be comparable with that of a servant of the company whose duty it may be under orders to perform part of the duties required by the contract. The signalman who was introduced into the discussion appears only to divert the argument on to the wrong line.

I am the more encouraged to take this view by the reflection that it obviously promotes, while the appellant's view obstructs, the principle of public policy which underlies the statute. In 1872 "for further securing the freedom and independence of Parliament" the Legislature made provision (1) disqualifying from being a member of the House of Commons any person who directly or indirectly himself undertook, executed, held or enjoyed in whole or in part any contract on account of the public service during the period during which he so undertook or enjoyed the benefit of such contract. The provision in the Municipal Corporations Act, 1835, is conceived in the like spirit. The object is manifest. It is to obtain for the public body concerned the disinterested advice of its members, so that they are not put in a position where their duty and interest conflict. It is intended also to prevent the possibility of members' votes and other matters being influenced by the promise or receipt of beneficial contracts. And it is further intended to secure the honour and dignity of the corporation itself by securing that there shall be no suspicion of the integrity of its members, and no ill-will amongst burgesses not members of the corporation, because they are passed over in business in preference to favoured councillors. No suspicion of corruption has been suggested in this case. But the facts disclosed make it clear that all the evils sought to be avoided may be present if such a position as the defendant's in this case is not within the Act.

I think that the judgment of Bailhache J. was right. It must have been one of the last judicial utterances of that great lawyer, and I rejoice to be in agreement with him in

(1) House of Commons (Disqualification) Act, 1801 (41 Geo. 3, c. 52).

seeking to maintain, though unsuccessfully, a statutory provision so essential to the maintenance of purity in local administration.

C. A. 1924

LAPISH v. BRAITHWAITE.

Appeal allowed.

Solicitors for appellant: *Peter Thomas & Clark, for Simpson, Peckover, Curtis & Batley, Leeds.*

Solicitors for respondent: *Smith, Fox & Sedgwick, for H. B. James & Morrish, Leeds.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A. 1924 *Nov.* 25.

SALFORD CORPORATION *v.* HALE.

Local Government—Housing—Dilapidation Notice—Expenditure by Local Authority—Demand upon Owner—Order for Payment by Instalments—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Housing, Town Planning, &c., Act*, 1919 (9 & 10 *Geo.* 5, *c.* 35), *s.* 28, *sub-ss.* 3 *and* 4.

Sub-ss. 3 and 4 of s. 28 of the Housing, Town Planning, &c., Act, 1919, which provide remedies for the recovery by a local authority from the owner of the expenses incurred by them under the section for the repair of houses necessary to make them reasonably fit for human habitation are not mutually exclusive but cumulative.

There is therefore nothing to prevent a local authority who have made an order for payment of the full sum under sub-s. 3, and failed to obtain payment from subsequently making an order for payment by instalments under sub-s. 4:—

Quaere, whether, a local authority who have made an order for payment by instalments under sub-s. 4 can subsequently make an order for payment of the full sum under sub-s. 3.

Wilson v. *Bolton Corporation* (1871) L. R. 7 Q. B. 105 distinguished.

Decision of Divisional Court affirmed.

APPEAL from the decision of the Divisional Court (Lord Hewart C.J., Shearman and Roche JJ.) on a case stated by stipendiary magistrate for the County Borough of Salford.

The facts as appearing from the case were as follows:—

The appellants in the Court below were the local authority for the Borough of Salford within the Housing, Town Planning, &c., Act, 1919, s. 28, and the respondent was the owner of houses in the borough to which that section applied. On

C. A. 1924

SALFORD CORPORATION v. HALE.

September 8, 1921, the appellants served a notice on the respondent, as owner, under s. 28 of the Act, to execute the works therein specified. The respondent ignored the notice, and the appellants then executed the work themselves in accordance with s. 28, sub-s. 2 (*a*), at a cost of 623*l*. On July 24, 1922, an account of this expenditure was sent to the respondent, and negotiations were afterwards entered into as to the method for repayment thereof. As a result an agreement was come to (as the magistrate found) whereby the respondent on December 13, 1922, paid to the appellants 19*l*. 10*s*., and agreed to pay the balance by instalments of a similar amount every quarter. The respondent subsequently declined to make any further payments, and on August 1, 1923, the appellants made orders under s. 28, sub-s. 4, declaring the expenditure in question to be payable by the respondent by monthly instalments. The respondent failed to pay the first monthly instalment due under these orders, and on November 9, 1923, summonses were taken out by the appellants for the recovery of the first monthly instalment under s. 28, sub-s. 4.

The respondent contended that as the appellants had sent him the complete account of expenditure on July 24, 1922, they had elected to recover the money under s. 28, sub-s. 3, and that as they had not taken proceedings for its recovery within six months afterwards they could not now proceed under s. 28, sub-s. 4.

The appellants contended that the remedies given by sub-ss. 3 and 4 of s. 28 were alternative, and that the period of six months did not begin to run until default had been made under the orders of August 1, 1923.

The stipendiary magistrate held that the respondent's contention was correct and dismissed the application.

The question for the Court was whether this decision was correct ?

Housing, Town Planning, &c., Act, 1919, s. 28, sub-s. 3 : " Any expenses incurred by the local authority under this section "—that is, for the repair of houses necessary to make them reasonably fit for human occupation—" may be recovered

in a Court of summary jurisdiction, together with interest at a rate not exceeding 5*l.* per centum per annum from the date of service of a demand for the same till payment thereof from the owner, and until recovery of such expenses and interest the same shall be a charge on the premises. In all summary proceedings by the local authority for the recovery of any such expenses, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand."

Sub-s. 4: "The local authority may by order declare any such expenses to be payable by monthly or annual instalments within a period not exceeding thirty years with interest at a rate not exceeding 5*l.* per centum per annum from the date of the service of notice of demand until the whole amount is paid, and any such instalments and interest or any part thereof may be recovered in a summary manner from the owner or occupier, and, if recovered from the occupier, may be deducted by him from the rent of such premises."

The Summary Jurisdiction Act, 1848, s. 11, provides in effect that the summary application for the recovery of money shall be made within six calendar months from the time when the matter of the complaint or information arose.

The Divisional Court reversed the decision of the stipendiary magistrate.

Lord Hewart C.J. in delivering judgment said that sub-ss. 3 and 4 of s. 28 of the Act of 1919 were not mutually exclusive. He did not suggest that sub-s. 4 could be used as a colourable attempt to enforce payment which could not otherwise be made; but if a local authority began with the intention of recovering the whole amount under sub-s. 3, and then held its hand, he was not satisfied that it would be debarred from proceeding under sub-s. 4, which contained no limit of time, to order payment by instalments. Here the action of the local authority was quite proper, and the case must go back to the magistrate with a direction that the respondent be ordered to pay.

Shearman J. said that the appellants had taken a reasonable course in first demanding from the owner the full sum and

C. A. 1924

SALFORD CORPORATION v. HALE.

then within six months endeavouring to negotiate for payment by instalments. It was said by the respondent that once the demand was delivered by the local authority under sub-s. 3, there was no further power to proceed under sub-s. 4. That was not so. It was open to the local authority to employ sub-s. 4 as an additional and supplemental remedy in a proper case, and the appeal must be allowed.

Roche J. agreed.

The respondent appealed. The appeal was heard on November 25, 1924.

Cyril Atkinson K.C. and *G. W. Bailey* for the appellant. Two points arise in this case. The first is that, apart altogether from any question of agreement, the respondents having made a demand under sub-s. 3 of s. 28 of the Act, and six months having expired, they are not entitled to proceed under sub-s. 4 of the section and so to recreate the personal liability of the appellant. The second point is that the respondents having entered into an agreement with the appellant, as is shown by the correspondence which forms part of the case stated, for the repayment by him of the expenditure incurred by the respondents by quarterly payments, it was not open to them to make an order for repayment by monthly instalments.

[SCRUTTON L.J. It is very difficult to see on the correspondence that there was any agreement at all.]

In the Court below the case was argued on the basis that there was such an agreement.

[POLLOCK M.R. I do not quite see why the sub-sections should be said to be alternative.]

It is submitted that the mere absence of the word "or" or some such word between the two sub-sections is not a sufficient ground for holding that the remedies given by the two sub-sections are not alternative. The more reasonable construction to put upon the section, it is submitted, is to hold that the two sub-sections are mutually exclusive and not cumulative: *Edlestone* v. *Francis* (1); *Wilson* v. *Bolton*

(1) (1861) 25 J. P. 135.

Corporation (1); *Tottenham Local Board of Health* v. *Rowell.* (2) *Prescott* v. *Nicholson* (3), which was relied upon by the respondents in the Court below, is really in the appellant's favour.

If the respondents adopt the procedure under sub-s. 3, they set in operation s. 11 of the Summary Jurisdiction Act, 1848, under which the personal liability of the owner to repay the expenditure incurred by the local authority is barred if proceedings are not taken to recover it within six months from the time when the demand for repayment was first made. Here the order for repayment was made by the respondents thirteen months after the date of the original demand. It is submitted, therefore, that the two sub-sections being mutually exclusive, the respondents having elected to proceed under sub-s. 3 are precluded from proceeding under sub-s. 4: *Wilson* v. *Bolton Corporation.* (2) The limitation of time imposed by s. 11 of the Summary Jurisdiction Act, 1848, would be of no avail to an owner if the rights of a loca authority, after being barred under sub-s. 3, could be revived under sub-s. 4.

Montgomery K.C. and *W. Allen* for the respondents were not called upon to argue.

POLLOCK M.R. This appeal raises a short point as to the meaning of sub-ss. 3 and 4 of s. 28 of the Housing, Town Planning, &c., Act, 1919. Sect. 28 deals with the case of an owner of houses who fails to make and keep such houses in all respects reasonably fit for human habitation. Where such an owner fails to do that, there are powers in the local authority enabling them to expend the money necessary to make the house in all respects reasonably fit for human habitation, and after they have expended the money then they have powers of requiring payment from the owner. Two different powers are given under sub-ss. 3 and 4.

Now what happened in this case was that the present appellant was the owner of certain houses which were in their

(1) L. R. 7 Q. B. 105. (2) (1880) 15 Ch. D. 378.
(3) (1889) 53 J. P. 597.

C. A. 1924

SALFORD CORPORATION v. HALE.

Pollock M.R.

then condition not fit for human habitation. Thereupon the local authority—the Mayor, Aldermen and Burgesses of the County Borough of Salford—took steps to serve notices upon the appellant, requiring him to execute the works specified in the notices. The appellant ignored the notices, and the local authority, acting as persons with the powers I have referred to, executed the work which had to be done to make these houses reasonably fit for human habitation at a cost of 623*l.* 11*s.* 9*d.*

On July 24, 1922, an account of the expenditure so incurred by the Mayor and Corporation of Salford upon the works specified, was sent to the appellant, and some negotiations or some correspondence took place between the appellant and the Town Clerk. It is said in the case stated, that as the result of such negotiations an agreement was come to whereby the appellant on December 13, 1922, paid the local authority 19*l.* 10*s.* on account of the said sum, and agreed to pay the balance by instalments of 19*l.* 10*s.* every quarter. The last paragraph of the case says that the documents, which are appended, are to be available for the Court.

I have looked through those documents—whether they are complete or not I do not know—but I cannot find in them that any agreement was come to, and although the appellant paid 19*l.* 10*s.* in December, 1922, he paid no more, and he subsequently declined to make any further payment. It is right to say, although I do not feel that it makes any difference in law on the point that I am going to discuss, that it is quite clear from the letters that if any agreement was proposed or come to, it was not to be taken per se as a satisfaction of the liability of the appellant. The Town Clerk says that if the sum of 19*l.* 10*s.* were paid in each quarter he would recommend the Corporation not to take proceedings for the recovery of the balance of the money provided "you keep your undertaking." It is clear therefore that accord and satisfaction could only arise as and when the present appellant in fact kept to and had strictly followed the terms of the agreement. What happened was that the appellant declined to make any further payments, and

on August 1, 1923, the respondents made orders under sub-s. 4 of s. 24 declaring the expenses incurred by the respondents to be payable by the appellant in monthly instalments.

What is said on behalf of the appellant is this. The steps that had been first taken by the Mayor and Corporation were for the purpose of implementing sub-s. 3, which provides that "any expenses incurred by the local authority under this section may be recovered in a Court of summary jurisdiction," and by virtue of s. 11 of the Summary Jurisdiction Act, 1848, the summary proceedings would have to be taken within six months from a certain date, and the time from which the six months is to be reckoned is, by the last clause of sub-s. 3, to be estimated from the date of service of the notice of demand. It is said that there was a service of the notice of demand. The six months thereupon began to run, and as by virtue of these negotiations no further proceedings could be taken under that section, the Corporation had lost their right, which they have now exercised under sub-s. 4, of making an order declaring that the expenses shall be repayable in certain specified sums spread over a long period. It is said that having once begun to make use of sub-s. 3 they have lost the right to invoke the powers of sub-s. 4, because these two sub-sections are alternative and exclusive. I do not agree with that argument. It appears to me that the two sub-sections are needed in appropriate cases. The first—namely, sub-s. 3—may well be used where the demand is for a sum which can be paid without much difficulty and recovered by summary proceedings. On the other hand sub-s. 4 may be a useful method where the sum which has to be recovered is considerable, and it may not be fair to ask a defaulting owner to pay by one single instalment.

Now it is said that under sub-s. 4 it may be very unfair for a local authority to make some order burdensome upon the owner and of such a nature as would make it impossible for him to comply with it. But it must be borne in mind that the whole section is to be deemed to be part of Part II. of the principal Act—that is, of the Housing of the Working Classes Act, 1890—and as Scrutton L.J. has pointed out, in

C. A. 1924

SALFORD CORPORATION v. HALE.

Pollock M.R.

Part II. of the Act of 1890 and by virtue of s. 35, "Any person aggrieved by an order of the local authority under this Part of this Act, may appeal against the same to a Court of Quarter Sessions." Therefore, the Mayor and Corporation are not judges in their own case. They cannot make an unreasonable order without that order being subject to appeal, and it appears to me that the respondent to any such order has sufficient remedy to put it right if the terms of it are too burdensome in the circumstances.

The present point which we have to decide is quite a short one. It is said that one ought not to take much notice of the fact that there is no word "or" here between sub-ss. 3 and 4, and our attention has been called to *Wilson* v. *Bolton Corporation* (1), which deals with the question of expenses of paving a private street under the powers given to local authorities for paving under the Public Health Act, 1848. Where the local authority has gone in and paved a street, it is possible for them to recover sums from the owners or the occupiers, and the expenses they have incurred may be recovered from the owners in a summary manner, or the same may be declared by order of the said local authority to be private improvement expenses. If they are declared to be private improvement expenses, under certain subsequent Acts which I need not refer to further—but they are set out in the case—certain powers are given in respect of those private improvement expenses. It was decided in that case that where the local authority had acted and made their election to recover from the owner in a summary manner, they could not proceed afterwards by the alternative method because if they had exercised their option they had lost the right to adopt a different and alternative method. That appears quite clear from the terms of the statute, which provided by the word "or" that the two roads to be followed should be alternative. I do not think that that case in any way either governs or assists the judgment that we have to give in the present case.

There is no alternative word such as "or" between the

(1) L. R. 7 Q. B. 105.

two sub-sections in the present case, and it appears to me that the powers which are given may well be used as cumulative, being both appropriate in some cases. Inasmuch as there are no words indicating any option or election to be exercised by the Corporation, it appears to me that the two sub-sections are intended to be additional and cumulative, and in those circumstances, therefore, what has been done in the present case appears to be right.

The argument that was addressed to us by Mr. Atkinson on behalf of the appellant was that quite apart from the question of whether there was any agreement, a demand having been made under sub-s. 3, there was no power whatever to proceed under the alternative scheme. It would be extremely hard if, in a case where a demand had been made for the whole amount, it were not possible for the local authority to make use of their other powers enabling them first by order to declare the payment should be by instalments and then to recover those instalments as and when they fell due. In the next place it was contended by Mr. Atkinson that the agreement having been made, and being in fact in existence, it was only possible to make an order for payment by the agreed instalments.

For the reasons which I have given I do not think there was an agreement; but even if there was an agreement I see no reason why that agreement, unfulfilled on his part by the appellant, stands in the way of an order being made by the Corporation in order that they may recover the sum obviously due from the appellant and as to which he is merely endeavouring to take advantage of the terms of an Act of Parliament to obtain release. It appears to me, in agreement with what was said by the Lord Chief Justice, that the two sub-sections stand as cumulative, and that the case, as directed by the Divisional Court, ought to go back to the magistrate for a decision to be made by him that the sum was payable. Under those circumstances the appeal will be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. It seems to me that there is nothing in this Act which would debar a

C. A. 1924

SALFORD CORPORATION v. HALE.

Warrington L.J.

local authority from proceeding under sub-s. 4 of s. 28 in a case where they had obviously given notice of demand for payment of the whole sum and had allowed the period for taking proceedings before a Court of summary jurisdiction for recovery of that sum to elapse.

I think, however, that it is right to reserve the question whether, if an order is made for the payment by instalments under sub-s. 4, the local authority could afterwards proceed to recover the entire sum under sub-s. 3. It may well be—and I express no opinion on it—that proceedings for the recovery of the whole sum would properly be held to be inconsistent with an order previously made for payment by instalments. But it cannot be said that notice of the demand for the entire sum is inconsistent with a subsequent order for payment by instalments and proceedings founded thereon. In my opinion the appeal ought to be dismissed.

SCRUTTON L.J. I agree, and I will only add a few words of my own, because the wording of s. 28 of the Housing, Town Planning, &c., Act, 1919, is substantially the same as that of s. 257 of the Public Health Act, 1875, and therefore our decision may, if it is not carefully limited, be treated as having wide consequences.

The local authority have spent a sum of money in executing the works necessary to make houses suitable for persons of the working classes fit for habitation. They have demanded the whole sum from the owner, but six months have expired from the time of the demand without their taking proceedings to recover it. After the six months have expired they have made an order for payment of the whole sum by instalments, and it has been argued by the owner that having demanded the whole sum and not having recovered it within the six months the local authority cannot subsequently to that date make an order that the sum shall be payable by instalments. That argument must, I suppose, be based on the proposition that sub-ss. 3 and 4 are exclusive of each other, and that by using one you elect to use that one only and are deprived of the use of the other.

Now that proposition in its widest sense is obviously wrong, as is shown by *Tottenham Local Board of Health* v. *Rowell* (1), a decision of the Court of Appeal, in which it was held that the election by a local authority to declare the expenses of executing certain works to be private improvement expenses under s. 90 of the Public Health Act, 1848, did not deprive them of their right to a charge upon the property in question under s. 62 of the Local Government Act, 1858, thereby showing that the Court of Appeal regarded the remedies given by the two sections as co-existing.

I desire, however, like my Brother Warrington, to reserve the question whether making an order for payment by instalments prevents recovery of the whole amount by summary proceedings in a case where proceedings are taken within six months from demand. I can understand that it may be argued that making an order for payment by instalments excludes the power to recover, by summary proceedings, the whole amount. But the question here is whether starting to try to obtain the whole amount is so inconsistent with an order for payment by instalments that it excludes it. I should have thought the fact that you did not get the whole amount by the first proceedings was just the reason why you should try to get it by instalments. In a case where, as ordinarily happens, you have an owner who is not able to pay the whole amount, it would be just the case where the local authority would say: "Well, unfortunately we cannot get the whole amount—the man cannot pay the whole amount —but he may pay by instalments. We have tried to recover the whole amount and have failed, and we will get it back by instalments, thus protecting the ratepayers." Just as the Court of Appeal in the *Tottenham Local Board of Health* v. *Rowell* (1) could not say that the authority given by the earlier Act was destroyed by action under the later Act, so I cannot see why, if the local authority in this case fail to recover the whole amount under sub-s. 3, they should be prevented from getting part or the whole of the amount by instalments spread over a long period of years under sub-s. 4.

(1) 15 Ch. D. 378.

C. A. 1924

SALFORD CORPORATION v. HALE.

Scrutton L.J.

I can find no words in the Act to that effect, and the result would, in my view, be so contrary to public policy that I should require very clear words to oblige me to say that the local authority, having failed to get the whole amount, were prevented from getting it bit by bit in instalments if the owner was able to pay bit by bit, but could not pay the whole amount. For these reasons I think the appeal fails.

POLLOCK M.R. I desire to say that I meant to have added the same reservation as my Brothers Warrington and Scrutton L.JJ. have referred to as to the effect of first making use of the powers under sub-s. 4 and afterwards sub-s. 3.

Appeal dismissed.

Solicitors for appellant: *Maples, Teesdale & Co., for F. W. Watson, Manchester.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for L. C. Evans, Town Clerk, Salford.*

W. I. C.

1924
Nov. 20.

HORNSBY *v.* MAYNARD.

Landlord and Tenant—Rent Restriction—Dwelling-house—Licence to Landlord to use Part of House—"Rent"—Transfer of Burden or Liability—Exception from Demise—Right to Apportionment of Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1, *s.* 2, *sub-ss.* 1, 3; *s.* 12, *sub-ss.* 1 (*a*) (*c*), 2, 3.

By an agreement of tenancy made in 1917 a lady let to a tenant "all that messuage, tenement and premises situate and being No. 33 R—— Road" for a term of three years at a specified yearly rent in money, and the tenant agreed (inter alia) "to give unto the said landlady in consideration of the rent payable the use of the drawing-room and bedroom on the same floor in the within mentioned premises for her own occupation rent free"; and on the termination of that agreement the tenant remained in occupation of the premises as a statutory tenant on the same terms:—

Held, (1.) that the right given by the tenant to the landlady to use the two rooms was not "rent" within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that term there denoting rent in money only, and, consequently, that that right could not be taken into account in considering whether or not the agreed rent exceeded the standard rent by more than the permitted amount;

(2.) that the grant of the said right by the tenant to the landlady was not within s. 2, sub-s. 3, of the said Act, equivalent to a transfer to the tenant of a burden or liability previously borne by the landlord whereby the rent should be deemed to be increased; and

(3.) that the agreement of tenancy on its true construction was not a demise of the house with an exception therefrom of the two rooms, or a demise of only the portion of the house other than the two rooms, and, therefore, that the tenant was not entitled to an apportionment of the rent of the house under s. 12, sub-s. 3.

APPEAL from Brentford County Court.

Since before August 3, 1914, the plaintiff, Miss E. S. Hornsby, was the owner of the house, No. 33 Ranelagh Road, Ealing, in the county of Middlesex, and by a lease in existence on that date the house was let by her at a rent of 46*l.* 16*s.* a year, which was accordingly its standard rent, she paying the rates.

By an agreement made in 1917 the plaintiff, therein called the landlord, let the house to the defendant, T. W. Maynard, therein called the tenant, the agreement, so far as material, being in these terms: " . . . . the said landlord agrees to let and the said tenant agrees to take all that messuage tenement and premises situate and being No. 33 Ranelagh Road . . . . together with the use of the appurtenances thereunto belonging and landlord's fixtures for the term of three years from the 21st day of August 1917 at the yearly rent of 36*l.* payable monthly . . . . The said tenant hereby agrees to pay the said yearly rent at the times and in the manner aforesaid without any reduction or abatement whatsoever, and also to pay all rates taxes and assessments parliamentary parochial or otherwise assessed charged or chargeable on or in respect of the said premises (property tax on the rent alone excepted) . . . . . The said tenant further agrees to give unto the said andlady in consideration of the rent payable the use of the drawing-room and bedroom on same floor in the within mentioned premises for her own occupation rent free." On the termination of the agreement the defendant remained in occupation of the house on the same terms as a statutory tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

1924

HORNSBY v. MAYNARD.

The plaintiff served upon the defendant a notice dated September 21, 1920, purporting to be a notice of increase of the rent to 46*l.* 16*s.* a year, and the defendant thereupon paid rent monthly at the increased rate down to the end of 1922, when he ceased to pay rent on the ground that the notice of increase was invalid, as it was eventually held to be, and that he had paid rent exceeding that for which he was liable.

In November, 1923, the plaintiff brought the present action against the defendant in the county court, her claim, as subsequently amended, being for recovery of possession of the house, for 33*l.* rent, being eleven months' rent at 3*l.* a month, and for mesne profits. The defendant stated by way of defence (inter alia) that he denied that the sum claimed was owing by him as alleged or at all, and by way of counter-claim that he was entitled to recover the amount of excess rent paid to the plaintiff under s. 14 of the Act of 1920.

At the trial in the county court it was contended on behalf of the defendant that the passing over from the plaintiff to the defendant of the rates and the licence by the defendant to the plaintiff to use the two rooms were equivalent to rent and that the pecuniary rent of 36*l.* a year, in addition to these obligations, amounted to a total rent which exceeded by more than the amount permitted under the Act of 1920 the standard rent of the house contrary to s. 1 of the Act; that each of the said obligations amounted to a transfer to the defendant of a burden or liability previously borne by the landlord by virtue of which the rent should be deemed to be increased under s. 2, sub-s. 3, of the Act; and that on the true construction of the agreement the permission given to the plaintiff to use the two rooms was an exception from the demise, and as only the remaining part of the house was let to the defendant the rent should be apportioned under s. 12, sub-s. 3; and that on these grounds the defendant was entitled to a return of rent overpaid.

The county court judge gave his decision on May 16, 1924. He assessed the value of the taking over by the defendant of the rates at 10*l.* 16*s.* a year, so that, if that was treated as

rent and added to the pecuniary rent, it brought the rent of the house up to but not beyond the standard rent. He was of opinion that the licence to use the two rooms could not be treated either as rent, or as the transfer to the defendant of a burden or liability previously borne by the plaintiff, or as an exception from the demise of the whole of the premises, but in case a different view should be taken on appeal he assessed its value, fixing that also at 10*l.* 16*s.* He found that the plaintiff was entitled to 33*l.* for rent and the defendant to 24*l.* 6*s.* for rent overpaid under the invalid notice of increase. He therefore gave judgment for the plaintiff on the claim for the difference between the two last-mentioned sums—namely, 8*l.* 14*s.*, and mesne profits 15*l.*—and for the defendant on the counterclaim.

The defendant gave notice of appeal for an order that the judgment of the county court judge should be set aside and judgment entered for the defendant on the claim and on the counterclaim, or in the alternative that a new trial should be had on the grounds (inter alia) that the judge was wrong in his findings that the lease of the premises to the defendant was on its true construction a lease of the whole of the premises, that the defendant was not entitled to an apportionment of the rent, and that the defendant was not entitled to deduct any sum from the rent recovered under the lease in respect of the transfer to him of the burden of allowing to the plaintiff the use and occupation of two of the rooms in the premises; and that the judge was wrong in law in not finding that the lease was upon the true construction thereof a lease of a part only of the premises, that the defendant was entitled to an apportionment of the rent, that the defendant was entitled to make deductions from the reserved rent in respect of the transfer of the said burden to him, and that he was entitled to recover on the counterclaim 32*l.* 8*s.* for rent overpaid by him.

Humfrey Edmunds for the defendant. The county court judge ought to have found that the plaintiff was not entitled to recover any rent from the defendant on the claim, and

1924

HORNSBY v. MAYNARD.

that the defendant was entitled to recover from the plaintiff the amount which he counterclaims for rent overpaid.

The use of the two rooms given by the defendant to the plaintiff was "rent" within the meaning of that term as used in s. 1 and other sections of the Act of 1920. It does not appear that that term has a different meaning in the Act from that which it has at common law. The use of the rooms would be rent at common law, inasmuch as it imposed a burden on the defendant and gave an advantage to the plaintiff, which formed part of the consideration for the demise. A reservation by the landlord of a right to minerals or to services has been held to be rent. If a privilege such as this be not rent, it will be easy for persons to evade the Act by arranging that the landlord shall have the use of part of the house or some other concession, the yearly value of which added to the pecuniary rent will raise the actual rent above the permitted limit. The value of the use of the two rooms has been assessed at 10*l.* 16*s.* a year, and the value of the transfer to the defendant of the rates, which has been found to be equivalent to rent, has been assessed at the same sum. These burdens together thus represent a yearly sum of 21*l.* 12*s.*, which must be taken to have been paid by the defendant to the plaintiff as rent during each year of the tenancy that has elapsed. The only additional amount for which the defendant is liable is the amount necessary to bring these yearly sums up to 36*l.* a year, the rent payable under the agreement, and the defendant has already paid more than that amount of rent. Even if the rent under the agreement is the full standard rent, it cannot be said, having regard to these burdens and to the sums actually paid as rent, that any further rent is due from the defendant to the plaintiff.

The grant of the use of the two rooms was within the meaning of s. 2, sub-s. 3, of the Act of 1920, a transfer to the defendant of a burden or liability previously borne by the landlord as a result of which the rent should be deemed to be increased by the value of the burden—namely, 10*l.* 16*s.*; and on this ground also for the reasons already stated the defendant has overpaid the plaintiff.

The permission to the plaintiff to use the two rooms was an exception of these two rooms from the demise of the house, and not a mere licence to the plaintiff to use the rooms for her personal convenience: see Sheppard's Touchstone, 8th ed., 1826, vol. i., p. 78; *Cudlip* v. *Rundall* (1); *Lord* v. *Sydney Commissioners* (2); and *Rex* v. (*Earl*) *Pomfret.* (3) The defendant is therefore entitled to an apportionment of the rent of the house under s. 12, sub-s. 3, of the Act of 1920; and if an apportionment be made it will appear that the defendant has already overpaid the plaintiff.

A. M. Trustram Eve for the plaintiff. The county court judge did not overestimate the amount of rent due from the defendant to the plaintiff.

The licence to the plaintiff to use the two rooms was not "rent" within the meaning of the Act of 1920. That term must have the same meaning throughout the Act, and in some of the provisions of the Act it is plain that it means pecuniary rent and not rent of any other kind. Sect. 12, sub-s. 1, defines standard rent as meaning the rent at which the dwelling-house was let on a particular date; and sub-s. 2 provides (inter alia) that the Act shall apply to a house where the annual amount of the standard rent does not exceed one or other of certain specified sums of money. The standard rent of the house, which is its rent on a specified date, is thus a money rent. Sect. 2 provides that the amount by which the increased rent of a dwelling-house may exceed the standard rent shall be one or other of certain amounts, each of which is to be estimated in money and some of which are percentages of a money rent. Sect. 1 provides that if the increased rent exceeds by more than the permitted amount the standard rent, the excess shall be irrecoverable from the tenant. Sect. 6, which provides for the levying of distress for the rent of a house, is applicable to a money rent, but not to the enforcement of a right to the use of rooms in the house. The rent of the house for the purposes of the Act is the pecuniary rent reserved by the agreement of tenancy,

(1) (1691) 3 Salk. 156. (2) (1859) 12 Moo. P. C. 473.
(3) (1816) 5 M. & S. 139, 142.

1924

HORNSBY v. MAYNARD.

and except in accordance with the provisions of the Act it is not permissible to make any additions to or deductions from the rent so reserved: *Westminster and General Properties and Investment Co.* v. *Simmons* (1); and *Mackworth* v. *Hellard.* (2) The lease of a house for a pecuniary rent which was within the Rent Acts and an additional non-pecuniary rent which brought the total rent above the statutory limit, would not be an evasion of these Acts, because they have regard only to pecuniary rent.

The licence to the plaintiff to use the two rooms was not a transfer to the defendant of a burden or liability previously borne by the plaintiff within the meaning of s. 2, sub-s. 3, of the Act.

[SHEARMAN J. The Court does not require to hear any argument on behalf of the plaintiff on that point.]

The clause in the agreement by which the defendant agrees to give to the plaintiff the use of the two rooms for her own occupation, rent free, is not on its true construction an exception of these two rooms from the demise of the house. "An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee": per Lord Watson in *Cooper* v. *Stuart.* (3) In order that there may be an exception of property from a grant, there must be such a reservation of it that the title to it remains all along in the grantor and never passes to the grantee. By the clause in question the defendant agrees "to give" the plaintiff the use of the rooms, which shows that the rooms had been demised to the defendant, since a person cannot give that which he has not already got. Further, by the clause the defendant gives the plaintiff "the use . . . . for her own occupation" of the rooms, from which it appears that he is granting to the plaintiff a mere personal licence to use the rooms for her individual convenience only, so that if she

(1) [1919] W. N. 241. (2) [1920] W. N. 377.
(3) (1889) 14 App. Cas. 286, 289.

should die before the termination of the tenancy the licence would not pass to her personal representatives, but would revert to the defendant: *Moroney* v. *Macnamara*. (1) The fact that the tenancy agreement imposes on the defendant the liability to pay rates and to do repairs in respect of "the said premises"—namely, the house as a whole—shows that it was not intended that the two rooms should be excepted from the demise of the house. If the gift to the plaintiff of the use of the two rooms was not an exception from the demise, but merely a licence to use the rooms, then the whole house was let to the defendant, and he is not entitled to an apportionment of the rent under s. 12, sub-s. 3, or to repayment of any part of the rent which he has already paid on the ground that only part of the house was let to him.

Edmunds in reply. Apart from the Rent Acts the term "rent" is not restricted to pecuniary rent, and it does not appear from the sections referred to or otherwise that in these Acts the term is used in any but its ordinary sense. The clause by which the defendant gives the plaintiff the use of the two rooms for her own occupation does not mean that he only gives her the use of them for her own individual convenience or for the duration of her life, but that she may prevent other persons from entering the rooms. Even if it be construed as limited to the life of the plaintiff, it may still be an exception from the demise. The case of *Moroney* v. *Macnamara* (1) is not an English authority and it is inconsistent with the older authorities already cited on behalf of the defendant. The judgment in *Cooper* v. *Stuart* (2) does not show that an exception cannot be created by a grant and a regrant.

SHEARMAN J. In my opinion this appeal should be dismissed. The facts of the case may be shortly stated. The plaintiff, who is the owner of the dwelling-house in question, had let it on a lease, which was in existence in August, 1914, at a rent of 46*l*. 16*s*., that being accordingly its standard

(1) (1872) Ir. R. 6 C. L. 181; 20 W. R. 905.
(2) 14 App. Cas. 286.

1924

HORNSBY v. MAYNARD.

Shearman J.

rent, the rates being paid by the plaintiff. In 1917 the plaintiff let the house to the defendant on the agreement which forms the subject of the present dispute. [His Lordship read the agreement so far as material and continued:] Thus, by that agreement the plaintiff let to the defendant "all that messuage, tenement and premises situate and being No. 33 Ranelagh Road," the defendant agreed to pay the rates, and the defendant further agreed to give to the plaintiff in consideration of the rent payable the use of the dining-room and bedroom on the same floor for her own occupation rent free. The rent reserved by that agreement was less by 10*l.* 16*s.* than the standard rent of the house. Disputes arose between the parties, and in November, 1923, the plaintiff brought this action against the defendant in the county court for alleged arrears of rent, and the defendant counterclaimed for rent alleged to have been overpaid. The county court judge found that the exchange of the rates from the plaintiff to the defendant was an advantage to the former and a disadvantage to the latter, the value of which he assessed at 10*l.* 16*s.* a year, and that that should be treated as rent, thus bringing the new rent exactly up to the standard rent. He found that the right given by the defendant to the plaintiff to use the two rooms was an advantage to the plaintiff, and he assessed the value of that also at 10*l.* 16*s.* He gave judgment for the plaintiff for a certain sum, and the defendant now appeals.

It is contended on behalf of the defendant in support of the appeal that the value of the grant by the defendant to the plaintiff of the use of the two rooms was "rent" within the meaning of the Increase of Rent, &c., Restrictions Act, 1920, that under s. 1 of that Act the rent of the house had been thereby increased, and that the increased rent exceeded the standard rent by more than the permitted amount. It is further contended on behalf of the defendant that the said grant was an exception of the two rooms from the demise of the house, and that the defendant is entitled to an apportionment of the rent. A third argument on behalf of the defendant was that the said grant was under s. 2, sub-s. 3,

of the Act of 1920 a transfer to the defendant of a burden or liability previously borne by the plaintiff by which the rent should be deemed to be increased.

To take the last of these points first, I am satisfied that the giving by the defendant to the plaintiff of the right to use the two rooms was not within s. 2, sub-s. 3, a transfer to the defendant of any burden or liability previously borne by the plaintiff by which the rent should be deemed to be increased. That sub-section has no application to a licence of this description given by a tenant to his landlord. Apart from the exchange in the liability for the rates, there is here no transfer to the defendant of any burden or liability previously borne by the landlord.

Another of the points taken on behalf of the defendant, and one of greater importance and difficulty, is that on the true construction of the tenancy agreement between the parties there is an exception of the two rooms of which the use is given to the plaintiff, the meaning of the agreement being that the plaintiff lets to the defendant, not the whole house, but the house with the exception of the two rooms. That seemed a very formidable argument until our attention was called to the actual words of the demise. In my judgment it is clear that the tenancy agreement is for a grant by the plaintiff to the defendant of the whole of the house in question, and the clause by which the defendant gives to the plaintiff the use of the two rooms for her own occupation, rent free, is not an exemption of these rooms from the demise, but merely the giving by the defendant to this particular landlady of a personal right to the use of the rooms. Under the agreement the defendant is tenant of the whole house and not of part of it only, and, therefore, the defendant has no right to an apportionment of the rent of the house under s. 12, sub-s. 3.

It might no doubt be argued that the grant by the defendant to the plaintiff of the use of the two rooms was in the nature of a redemise of these rooms by the defendant to the plaintiff. Supposing, however, that it was a redemise, that would not entitle the defendant to an apportionment of the rent,

1924

HORNSBY v. MAYNARD.

Shearman J.

because it would imply that the whole house had been let to the defendant, and a tenant is not entitled to an apportionment, except where part only of the house has been let to him.

The remaining point taken on behalf of the defendant is that the value of the right given by the defendant to the plaintiff to use the two rooms is " rent " within the meaning of the Act of 1920, and that under s. 1 of that Act the rent of the house has thereby been unduly increased above the standard rent. It is said that there may be rent or an increase of rent in things other than money which are capable of being assessed in money. On the true construction of the provisions of the Act it seems to me that the term " rent " in s. 1 and the other sections in which it occurs means rent payable in money and in money alone. It is urged that, if this be so, the Act has left it open to the parties to an agreement of tenancy successfully to evade its provisions by arranging that the landlord shall have some privilege, the value of which, added to the pecuniary rent, will increase the total actual rent beyond the statutory limit. It is not for me to criticize the policy of the Act and I do not presume to do so. I take the Act as I find it. So taking it I think it is restricted to pecuniary rent. The only way in which persons can be prevented from evading it by substituting some other consideration for rent in money, is by showing that the giving of that other consideration comes under s. 2, sub-s. 3, relating to the transfer of a burden or liability previously borne by the landlord, or under s. 8, which prohibits a person from requiring a fine or premium as the condition of the grant of a tenancy. The third point taken on behalf of the defendant also fails.

In my opinion the appeal should be dismissed.

SALTER J. I am of the same opinion, and I will add only a very few words. I am unable to construe this tenancy agreement as demising only that part of the dwelling-house in question other than the two rooms of which the plaintiff is to have the use, or as demising the whole house with the

exception of these two rooms. It appears to me to be a demise of the whole house including these rooms.

As to the argument founded upon s. 2, sub-s. 3, of the Act of 1920, it seems to me that the giving of the use of the two rooms by the defendant to the plaintiff was not, within the meaning of that sub-section, a transfer to the defendant of any burden or liability previously borne by the landlord whereby the rent should be deemed to be increased.

The most important of the points taken on behalf of the defendant may be thus stated: Suppose that a dwelling-house, which had been let to a tenant at the full standard rent, was let to a new tenant on the terms that that tenant should pay the full standard rent in money and should allow the landlord the use of part of the house rent free, or should take the landlord as a lodger or render him certain services, is the additional benefit thus given by the tenant to the landlord "rent" within the meaning of the Act of 1920, so that the rent of the house has been thereby "increased" within the meaning of s. 1 of that Act? The pecuniary consideration for the demise is not larger, but the actual consideration is larger. The question is whether or not "rent" in s. 1 and the other sections of the Act refers only to money. At common law the term "rent" was not restricted to pecuniary rent. Tenancies under which the rent was payable by way of services were formerly very common, and such tenancies are still to be met with. In this Act, however, having regard to its own provisions and to the authorities decided upon it to which our attention has been called, I think that the term "rent" applies only to pecuniary rent. I regret to have to come to this conclusion, because it follows that the Act can be in some respects evaded.

Appeal dismissed.

Solicitors for appellant: *Frank Daphne, for Wilfrid Firth, Brentford.*

Solicitor for respondent: *Edward Mackie, Ealing.*

J. R.

C. A.

1924

Nov. 14, 17, 18; *Dec.* 1.

[IN THE COURT OF APPEAL.]

BACK (Inspector of Taxes) *v.* DANIELS.

Revenue—Income Tax—Occupation of Lands—Special Agreement for Hire of Lands to grow Potatoes on—Potato Growers also Potato Merchants and Salesmen—Assessment of Profits of growing Potatoes under Sch. B or Sch. D—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. B, Sch. D.*

The respondents, who were wholesale potato merchants and potato salesmen carrying on business in London, owned land on which they grew potatoes, and also hired land under ordinary tenancy agreements for the same purpose. They also grew potatoes on land in Lincolnshire which they hired from neighbouring farmers under special agreements, the lands so hired being changed each season. Under those special agreements, by which the land was purported to be let to the respondents, the respondents had possession of the land until the potatoes were fully ripe, which in some cases was more than a year from the date of the agreement and in others was less than a year. The landlord under the agreement had to plough the land, do all the carting and provide all the horse labour that was necessary. The respondents supplied all the seed, artificial manure, and the manual labour necessary to drill the manure, plant the seed, take up and pit the potatoes and afterwards prepare them for market. The landlord was paid 3*l.* per acre as rent for the land, and 15*l.* per acre for supplying all horse labour, etc., which sum also included all rates and taxes. The landlord was, and the respondents were not, assessed to income tax under Sch. B in respect of those lands. The respondents sold the potatoes, which they had grown in the course of their business as potato salesmen. They were assessed in London to income tax under Sch. D on the profits of their business as potato merchants and salesmen, and the profits they made from the sale of potatoes grown on the lands under those special agreements were included in that assessment:—

Held, that having regard to *Smith* v. *St. Michael, Cambridge* (1860) 3 E. & E. 383; *Holywell Union and Halkyn Parish* v. *Halkyn District Mines Drainage Co.* [1895] A. C. 117; *Roads* v. *Overseers of Trumpington* (1870) L. R. 6 Q. B. 56; *Reg.* v. *St. Pancras Assessment Committee* (1877) 2 Q. B. D. 581; *Crosby* v. *Wadsworth* (1805) 6 East, 602; *Burt* v. *Moore* (1793) 5 T. R. 329; *Cox* v. *Glue* (1848) 5 C. B. 533; and *Jones* v. *Flint* (1839) 10 Ad. & E. 753 the respondents had the use of the lands on which they grew potatoes under the special agreements in a full sense of the term, with full power to maintain their rights, and must therefore be deemed to be occupiers within the meaning of r. 2 of No. VII. of Sch. A.

Held, also, that the fact that the "landlord" had been assessed and charged to income tax under Sch. B in respect of the occupation of the lands did not conclude the matter against the respondents, as having regard to the reasoning of the Court in *Cox* v. *Glue*, 5 C. B. 533, there might under Sch. B be two persons who were chargeable as occupiers in respect of the same lands.

C. A.
1924

BACK
v.
DANIELS.

Held, therefore, that the respondents were assessable in respect of the profits arising from the occupation of the lands in question under Sch. B and not under Sch. D.

Per Scrutton L.J.: Where there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, there may be a separate assessment of that operation; but the fact that the farmer sells his produce either on the farm or at a local market, or at Mark Lane, or even that he sells it in a shop, does not justify an assessment under Sch. D as well as or in substitution for Sch. B.

Decision of Rowlatt J. [1924] 2 K. B. 432 affirmed.

APPEAL from the decision of Rowlatt J. (1) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners held on November 3, 1922, for the purpose of hearing appeals, L. V. Daniels and P. L. Daniels, trading as Joseph S. Daniels (hereinafter called the respondents), appealed against an assessment to income tax under Sch. D in the sum of 9632*l.* for the year ending April 5, 1922, made upon them by the Additional Commissioners for the Tower Division of the County of Middlesex under the provisions of the Income Tax Acts in respect of the profits of the business of wholesale potato merchants, fruit and vegetable salesmen and potato growers carried on by the respondents at 107 Commercial Street, London.

2. The respondents grew potatoes upon lands which they both owned and occupied and also upon lands which they occupied under ordinary tenancy agreements. The profits of the occupation of those lands were not included in the Sch. D assessment which was the subject of this case, and with regard to those lands no question for the Court arose.

3. In addition to growing potatoes on the lands mentioned in the preceding paragraph the respondents grew potatoes on lands which they hired from neighbouring farmers at Holbeach in Lincolnshire and elsewhere under special agreements in the form mentioned in para. 5 hereof.

(1) [1924] 2 K. B. 432.

C. A. 1924

BACK v. DANIELS.

This appeal related only to potatoes grown on lands hired by the respondents under these special agreements. The profits derived by the respondents from potatoes grown on these lands were included in the assessment under Sch. D appealed against, and the only question for the opinion of the Court was whether those profits had been rightly included in the Sch. D assessment.

4. The potatoes grown on the lands referred to in the preceding paragraph together with the other produce of the respondents were sent to London and sold by the respondents at 107 Commercial Street in London.

5. The memorandum of agreement which follows was admitted to be typical of the agreements referred to in para. 3 above.

"Memorandum of Agreement made October 11, 1921, between H. P. Carter of Abbots' Manor, Holbeach, in the county of Lincolnshire, ... hereinafter called the landlord, of the one part, and P. L. Daniels and L. V. Daniels (trading as Joseph S. Daniels) of Spitalfields Market, London, E. and other places, farmers and potato merchants, hereinafter called the tenants, of the other part, whereby the landlord has agreed to let and the tenants have agreed to take the one in consideration of the agreement of the other subject to survey eight fields consisting of 157 acres or thereabouts of land exclusive of headlands known as [describing them] now in the occupation of the said landlord upon terms and conditions following that is to say :—

"(1.) The tenants shall have possession of the said land for the purpose of growing potatoes from the date of this agreement until the potatoes are fully ripe and in fit condition to be stored in pits and in addition to possession of so much thereof or of other equally convenient land to be submitted therefor with the consent in writing of the said tenants as shall be required for pitting their seed and storing their crop in pits until such time as the said crop is sold and removed in the ordinary course of trade.

"(2.) The tenants shall at their own cost and expense provide all necessary seed and shall also at their own cost

supply 12 cwts. of the usual artificial potato manure to each acre.

"(3.) The tenants shall at their own cost and expense supply all the manual labour (except such as is usually performed by the horsemen and waggoners) necessary to drill the manure and plant the seed mentioned in cl. 2 hereof and take up and pit the potatoes and afterwards riddle, sort, clean and otherwise prepare the same for market.

"(4.) The landlord shall at his own cost and expense plough ten inches deep, and when requested well and sufficiently cultivate and work the said land and make the rows, cart the manure and seed from the nearest station or landing place on to the land and provide all horse labour (except such as is to be provided by the said tenants under the provisions of cl. 3) that is necessary and required for drilling manure, properly covering the potatoes in the rows, and for the successful production and careful scuffling, moulding, spraying and ploughing up the crop and harrowing and cross harrowing according to the custom of the country around and carting to the pits pitting and delivery on rail of the same to the satisfaction of the tenants or their agents.

"(5.) The landlord shall deliver the potatoes on rail at Holbeach or Fleet Stations at such times and in such quantities as the tenants shall require them, and shall for such purpose provide sufficient men, horses, carts, straw and sheets to load and convey the potatoes to the station, properly protected from damage by frost and weather or otherwise, and unload the same into trucks, and shall also provide sufficient dry wheat straw and cover therewith the ends sides and the top of each truckload of the potatoes so as to effectually protect the same from damage by frost and weather or otherwise in transit.

"(6.) The landlord shall supply the tenants free of charge with an ample quantity of dry wheat straw to safely and efficiently cover the seed and the whole of the crop in pits and to effectually protect the same from damage by frost and weather or otherwise.

"(7.) The landlord hereby undertakes and agrees to supply

C. A. 1924

BACK v. DANIELS.

and carefully spread on the said land all the good rotten crewyard dung possible.

"(8.) The landlord hereby undertakes and agrees to occupy the said land until the said crop of potatoes shall have been cleared off the land and will in the meantime pay all rent, rates, taxes, charges and assessments that may be due from him in respect of his holding and also in no way suffer the said crop of potatoes to be distrained upon or to be taken or levied in execution.

"(9.) The landlord shall procure the consent of the superior landlord to this agreement if by the terms of his tenancy such consent is necessary.

"(10.) The tenants shall pay as and for rent of the said land the sum of 3*l.* per measured acre, and in consideration of the landlord supplying all horse labour and men to work the horses and other manual labour as mentioned in the preceding clauses to be executed by the landlord, the sum of 15*l.* per measured acre, top and bottom headlands not to be planted or measured in the acreage, which sum shall include all rates and taxes, parochial and Parliamentary, levied or hereafter to be levied. Payments to be made as follows:—End of September, 1922, 500*l.*; end of October, 1922, 500*l.*; end of December, 1922, 500*l.*; end of January, 1923, 500*l.*; end of February, 1923, 500*l.* Balance end of March, 1923, but it is hereby agreed that should the tenants clear a larger acreage of land than is covered by the several instalments for payment as they become due, then the several instalments are to be accelerated in proportion to the land cleared.

"In witness whereof the said parties hereto have hereunto set their hands the day and year first hereinbefore written."

6. Land held under the agreements in question was given up to the farmer as soon as the crop was lifted and carted away, the time taken for the complete operation from the commencement of cultivation to the carrying of the crop varying with the kind of potatoes grown. In the case of early potatoes the respondents were usually in possession of the land for less than a year, in other cases for more than

a year. To secure proper rotation of crops the same land was never utilized for the purpose of growing potatoes for the respondents for two years in succession. [A statement was included in the case which showed, in the case of potatoes planted in the spring of 1921, that the cultivation of the fields commenced in the beginning or middle of September, 1920, and that the fields were cleared, in the case of early potatoes, in the first week of July, 1921, in the case of second early potatoes, in the middle of September, 1921, in the case of late potatoes, in the middle of October, 1921.]

7. The farmers and not the respondents were the rated occupiers of the lands in question, and the farmers and not the respondents were assessed and charged to income tax under Sch. B in respect of the occupation of the lands.

8. Counsel for the respondents contended

(*a*) that the lettings under the special agreements in question were not lettings for a period less than a year;

(*b*) that the respondents were in complete occupation of the lands in question;

(*c*) that the farmers were erroneously assessed under Sch. B in respect of the occupation of these lands, and that the fact that the farmers and not the respondents were actually assessed did not prejudice the respondents' case;

(*d*) that the fact that the farmers were assessed under Sch. B on twice the annual value showed that the lands had been treated as being occupied solely for the purpose of husbandry;

(*e*) that as the agreement provided for a payment to cover all rates and taxes, parochial and Parliamentary, it was immaterial whether the Sch. B assessments were made on the farmer or on the respondents, and that neither of the parties had objected to such assessments on those grounds;

(*f*) that the cases of *McKenna* v. *Herlihy* (1) and *Donald* v. *Thomson* (2) were not in point, as the lands in those cases were let for periods less than a year and the appellants were graziers deriving profits other than profits of husbandry from

(1) (1920) 7 Tax Cas. 620.
(2) 1922 S. C. 237; 59 S. L. R. 246; 8 Tax Cas. 272.

C. A. 1924

BACK v. DANIELS.

buying and selling cattle. Moreover in *Donald's* case (1) the grazier only occupied the land from May to November ;

(*g*) that the profits derived by the respondents from growing potatoes on these lands were not assessable under Sch. D.

9. The Inspector of Taxes on behalf of the Crown contended (inter alia)

(*a*) that the farmers and not the respondents were the occupiers of the lands ;

(*b*) that the farmers had been properly assessed under Sch. B in respect of the occupation of the lands, and that the respondents were not so assessable ;

(*c*) that the agreement did not amount to a demise of the land but was merely a contract for the purchase of potatoes by the respondents to be grown on lands of the farmers ;

(*d*) that the profit arising to the respondents from the growing and sale of the said potatoes was a profit arising from their trade of wholesale potato merchants and was not a profit arising from the occupation of land ;

(*e*) that the said assessment under Sch. D was correct and should be confirmed.

10. The Special Commissioners, having taken time to consider their decision, held that the respondents were the occupiers of the lands in question, and they reduced the assessment to 2577*l*.

On appeal Rowlatt J. held that the respondents were in occupation of the lands on which they grew potatoes under the special agreements, and were assessable in respect of the profits arising therefrom under Sch. B and not under Sch. D.

The Crown appealed. The appeal was heard on November 14, 17, and 18, 1924.

Sir Patrick Hastings K.C., *Sir Henry Slesser K.C.* and *R. P. Hills* for the appellant. The proper person to be assessed under Sch. B was the landlord, and not the respondents. Further, an assessment under Sch. B is not

(2) 1922 S. C. 237 ; 59 S. L. R. 246 ; 8 Tax Cas. 272.

exhaustive. The owner is taxed under Sch. A; the occupier under Sch. B; but if profits are made by way of trade, Sch. D also applies, and a payment under either Sch. A or Sch. B does not prevent an assessment also under Sch. D.

In this case the farmer is solely liable under Sch. B. He has charge of the land and looks after the hedges and ditches. There is no defined period for which the respondents occupy the land; they no longer have the land after one crop has been grown. They cannot get the use of the land, although they may derive profit from going on the land: *Miller* v. *Anderson.* (1) The farmer cannot on the face of the agreement say that he is not in occupation of the land, and, if so, the respondents cannot say that they also are in occupation. Sch. B presupposes that there is only one tax under that schedule.

[WARRINGTON L.J. referred to *Hill* v. *Gregory.* (2)]

The farmer chooses to use his land in this way, preferring to take 18*l.* per acre instead of running any risk himself. The right of grazing does not involve liability under Sch. B: *McKenna* v. *Herlihy* (3); *Donald* v. *Thomson.* (4) The farmer alone could have maintained an action of trespass.

But assuming that the respondents could have been properly assessed under Sch. B, then that is not exclusive or exhaustive: *Coman* v. *Governors of Rotunda Hospital, Dublin* (5); *Carlisle and Silloth Golf Club* v. *Smith.* (6) The Crown is willing, upon an assessment under Sch. D, to allow for any tax payable under Sch. B in this case.

Latter K.C. and *Sir Stanford London* for respondents. Assessment under Sch. B is intended to cover all profits made out of the occupation of the land: *Donald* v. *Thomson.* (7) A farmer who sells his products in a shop or off the farm is not liable to assessment under Sch. D. The respondents' occupation is a rateable occupation assessable under Sch. B. The farmer is doing work for the respondents, who are in

(1) (1922) 8 Tax Cas. 279.
(2) [1912] 2 K. B. 61.
(3) (1920) 7 Tax Cas. 620.
(4) 1922 S. C. 237; 59 S. L. R. 246; 8 Tax Cas. 272.
(5) [1921] 1 A. C. 1; 7 Tax Cas. 517.
(6) [1913] 3 K. B. 75.
(7) 8 Tax Cas. 272.

C. A. 1924

BACK v. DANIELS.

occupation and who have the risks and the profits of the husbandry, and therefore the use of the land. The tax under Sch. B is a tax on the profits of husbandry: rr. 5 and 6 of Sch. B. A Sch. D activity does not affect a Sch. B activity: *Brown* v. *Watt.* (1) The farmer is not in occupation of the land for the profits or gains of husbandry, the respondents were in exclusive possession of it: *Smith* v. *St. Michael, Cambridge.* (2)

[SCRUTTON L.J. referred to *Roads* v. *Overseers of Trumpington.* (3)]

Who is the occupier, is a question of fact. If the exercise of the rights given by a licence involves a physical possession of the soil and the right is an exclusive right, then on entering the licensee becomes the occupier and is liable to be rated: *Kittow* v. *Liskeard Union* (4); Ryde on Rating, 4th ed., pp. 56, 57. Where there is a right to exclusive possession for a certain purpose that amounts to a demise: *Glenwood Lumber Co.* v. *Phillips* (5); *Holywell Union and Halkyn Parish* v. *Halkyn District Mines Drainage Co.* (6); *Middleton's* case (7); *Donald* v. *Thomson* (8); *McKenna* v. *Herlihy* (9); *O'Flaherty* v. *Kelly* (10); and *Miller* v. *Anderson* (11) are all distinguishable from the present case.

Sir Patrick Hastings K.C. replied.

Cur. adv. vult.

Dec. 1. The following written judgments were delivered:—

POLLOCK M.R. This is an appeal from a judgment of Rowlatt J. given on July 14, 1924, whereby he confirmed the decision of the Commissioners for the Special Purposes of the Income Tax Acts, who had reduced the assessment upon the respondents.

The two respondents to this appeal trade as Joseph S. Daniels and carry on at 107 Commercial Street, E.C., the business of

(1) (1886) 2 Tax Cas. 143.
(2) 3 E. & E. 383.
(3) L. R. 6 Q. B. 56.
(4) (1874) L. R. 10 Q. B. 7.
(5) [1904] A. C. 405.
(6) [1895] A. C. 117.
(7) (1876) 1 Tax Cas. 109.
(8) 8 Tax Cas. 272.
(9) 7 Tax Cas. 620.
(10) [1909] 1 I. R. 223.
(11) 8 Tax Cas. 279.

wholesale potato merchants, fruit and vegetable salesmen and potato growers. As merchants they buy and sell potatoes as well as other vegetables and have been assessed on the profits of this business. In addition to buying potatoes that they sell, they produce some on lands which they own in respect of which they are taxed under Sch. A and on lands which they occupy as tenants in respect of which they pay income tax under Sch. B. They also sell the potatoes grown on lands which are the subject of a special and somewhat unusual agreement. Transactions in these potatoes they claim should not be included in the assessment made upon them under Sch. D, because they form the produce of the lands of which, under the special agreement, they claim to be occupiers, and to be taxable only under Sch. B.

The terms of the special agreement are set out in para. 5 of the case, and the question for decision herein is whether the respondents are "occupiers" under it so as to be taxable in respect of it under Sch. B, unless they had exercised the option which occupiers of land for the purposes of husbandry only are granted, under r. 5 of Sch. B, to be taxed under Sch. D.

The agreement is dated October 11, 1921, and made between H. P. Carter, thereinafter called the "landlord," and the respondents, who are called tenants, whereby the "landlord" agreed to let and the tenants agreed to take "certain fields now in the occupation of the landlord for the purpose of growing potatoes." Put shortly the effect of the agreement is this, that certain fields which are not the same in each year, because of the necessity of maintaining the rotation of crops, are granted to the respondents to be used by them for raising potatoes upon them. They supply the seed potatoes and the artificial manure used and the labour necessary to drill the manure and plant the seed potatoes, as well as to take up and pit the potatoes and afterwards riddle, sort, and clean and otherwise prepare them for market.

The "landlord" is to work and prepare the land and do all the work upon it necessary to be done by horse labour,

C. A. 1924

BACK v. DANIELS.

Pollock M.R.

the carting involved to and from the nearest station, whether incidental to fetching the seed and artificial manure therefrom, or conveying the crop when raised and ready for market, thereto.

The tenants are to pay a rent of 3*l.* per acre measured as used, for this use of the fields as well as a sum of 15*l.* per acre, similarly determined, for the horse labour and men to work the horses and other manual labour provided, and this sum includes all rates and taxes.

The duration of the use of the land thus conferred upon the respondents may extend to a full twelve months or even more, or less according as the crop sown is of early, main crop, or late potatoes.

The respondents contend that they are for the purpose of the Income Tax Acts to be deemed occupiers of the lands thus used by them. They have not exercised their option to be taxed under Sch. D. They claim that the potatoes are grown and produced as the result of their occupation of the lands and that while they are liable to be assessed under Sch. B in respect of this occupation, the potatoes so grown cannot be distinguished from any other produce of husbandry marketed in ordinary course, and that the profits from the sale of them are not to be included in any assessment under Sch. D.

Rowlatt J. acceded to these contentions and held the respondents to be occupiers of the lands and taxable only as such under Sch. B. I agree with him and for the reasons which he gives in his judgment.

The agreement of October 11, 1921, in form confers a tenancy upon the respondents, but I do not overlook the agreement of the "landlord" under cl. 8, to occupy the land until the crop has been cleared off the land.

The terms of the agreement itself do not conclude the matter; it is necessary to have regard to the substance of it: *Smith* v. *St. Michael, Cambridge.* (1)

In *Holywell Union and Halkyn Parish* v. *Halkyn District Mines Drainage Co.* (2) Lord Herschell said: "The question

(1) 3 E. & E. 383, 390. (2) [1895] A. C. 117, 125.

whether a person is an occupier or not within rating law is a question of fact, and does not depend upon legal title," and Lord Macnaghten said (1) : " Liability to rates is not a matter of title. The question in each case must be whether there is in fact such an occupation as, according to the Statute of Elizabeth and a course of decisions which have been recognised and established as law, carries with it liability for rating purposes." Upon the above principle, and the case of *Roads* v. *Overseers of Trumpington* (2), the respondents appear to be in occupation of the land so as to make them liable for rates. The parties to the agreement specially guarded against this result by the insertion in cl. 10 of an express provision that the payment of the 15*l.* " shall include all rates . . . . levied or hereafter to be levied."

The respondents were under cl. 1 of the agreement to have possession of the land, but although possession is an element of, it is not equivalent to occupation : see *Reg.* v. *St. Pancras Assessment Committee.* (3) In *Roads* v. *Overseers of Trumpington* (2)—the coprolite case—the contractors were to enter upon the land and dig for coprolites and reinstate the land, and, as Lord Blackburn summarizes their position, were to do everything that was to be done on the land. In the present case, the respondents are to plant and harvest the only crop that is to be grown on the land, and the payments to be made by them are for rent to their " landlords " and a sum for services to be rendered incidental to, and required for, the respondents' crop of potatoes. It seems that the respondents could bring trespass quare clausum fregit against any person who entered upon the land ceded to them, and interfered with their sown crop. In *Crosby* v. *Wadsworth* (4) it was held that the man who had contracted with the owner of a close for the purchase of a growing crop of grass—to be made into hay—has such an exclusive possession of the close, though for a limited purpose only, that he may maintain trespass quare clausum fregit against any person entering the close and taking the grass even with the assent of the

(1) A. C. 127.
(2) A. C. 6 Q. B. 56.
(3) 2 Q. B. D. 581, 588.
(4) 6 East, 602, 609.

C. A. 1924

BACK v. DANIELS.

Pollock M.R.

owner. Lord Ellenborough says: "he might in respect of such exclusive right maintain trespass against any persons doing the acts complained of in violation thereof." In *Burt* v. *Moore* (1), where the use of dairy cows was granted to B. to be fed on land of A., Lord Kenyon said that though B. was "restrained by the agreement to a particular mode of occupation, he is to be considered as the occupier of the land; and, being entitled to the sole use of the land, is also entitled to maintain trespass, or to justify distraining the plaintiff's cattle damage feasant there." See also *Cox* v. *Glue* (2), as to the right to bring trespass in enforcement of their respective rights by those in possession of the surface or the subsoil of the land.

The agreement of October 11, 1921, cannot be regarded as a mere sale of the crop as in *Jones* v. *Flint* (3), but as conferring the right to the possession and use of the land with the incidental right to bring trespass in respect of it. By r. 2 of No. VII. of Sch. A: "Every person having the use of any lands or tenements shall be deemed to be the occupier thereof." Upon consideration of the cases that I have referred to, it seems clear that the respondents have the use of the lands, in a full sense of that term, with power to maintain their rights. In my judgment therefore they must be deemed to be occupiers within the above rule, which is the interpretation clause for Sch. B.

The case states that the "landlord" has been assessed and charged to income tax under Sch. B in respect of the occupation of the lands. That may be so, but it does not conclude the matter as against the respondents. I do not shrink from the result that there may be two persons who may be chargeable as occupiers under Sch. B, especially in view of the reasoning of the Court in *Cox* v. *Glue*. (2) In my judgment the respondents are right in their contention that their liability to assessment and tax falls under Sch. B and not under Sch. D, and that the Commissioners were right in their decision.

The appeal will be dismissed with costs.

(1) 5 T. R. 329, 333. (2) 5 C. B. 533.
(3) 10 Ad. & E. 753.

C. A.
1924
BACK
v.
DANIELS

WARRINGTON L.J. The question in this case is whether the respondents are entitled to be assessed to income tax under Sch. B in respect of the occupation of the lands in question, and the real issue between them and the Crown is whether they are in fact the occupiers of the lands within the meaning of Sch. B.

The Crown have sought to charge them under Sch. D in respect of the profits and gains accruing to them from the trade or business of potato merchants and salesmen so far as they are produced by the growing of potatoes on these lands and the sale thereof in the market. If the respondents are entitled to be assessed under Sch. B as the occupiers of the land, they cannot in my opinion, without their own consent, be charged also under Sch. D in respect of the profits in question, such profits being profits arising from the occupation of lands for the purposes of husbandry. The respondents might elect to be charged in respect of their profits under Sch. D (Sch. B, r. 5), but unless they so elect they can only properly be charged under Sch. B. Was the learned judge right then in upholding the view of the Commissioners that the respondents were the occupiers of the land for the purposes of husbandry? I felt, and expressed during the argument, some doubt whether this was so, but upon reflection and on further consideration of the terms of the agreement, I am satisfied that the view of the Commissioners and the learned judge is correct.

It is clear that the growing during the season 1921–22 of a crop of potatoes meant devoting the land to that purpose exclusively for that season. The tenants are to have possession during the period of preparation and the period during which the crops are attaining maturity. That possession seems to me to be exclusive for the purpose for which the land is to be used. On the authorities the tenants would be able to bring trespass quare clausum fregit against any person, including the landlord, who might go upon the land and interfere in any way with the crop once it had been sown. Even during the period of preparation they are in possession, and I think they would by virtue of such possession

C. A. 1924

BACK v. DANIELS.

Warrington L.J.

be entitled to maintain such an action. It is true that during this period the landlord is entitled to enter, but this is only for the purpose of performing his obligations under the agreement between himself and the tenants, and the same is true of the subsequent period during which he has to perform on the land acts of cultivation and other acts mentioned in the agreement as to be done by him. Clause 8 of the agreement providing for the "continued occupation" of the land by the landlord does not in my opinion interfere with the view that looking at the substance and effect of the agreement as a whole the tenants are the occupiers of the land in question. It was obviously inserted with a view first to preserve the tenants from ejectment under a superior title, and secondly to cast upon the landlord rates, taxes, and so on, to the liability for which the tenants' possession of the land might otherwise expose them. Neither do I think there is anything in the fact that the landlord was rated to the poor and assessed to income tax in respect of the lands in question and the occupation thereof. To have charged the tenants would have involved a valuation separately from the rest of the farm of the lands covered by the agreement, and having regard to cl. 8 there was no object in doing so, as the ultimate liability would in any case fall on the landlord.

I agree that the appeal ought to be dismissed with costs.

SCRUTTON L.J. This appeal raises a troublesome question as to the assessment to income tax of the persons interested in potato growing on some land in Lincolnshire under a system common in that county. One Carter originally occupied some land in that county and was assessed under Sch. B as occupier. On October 11, 1921, he entered into an agreement with two gentlemen named Daniels, who amongst other things are potato merchants at Spitalfields Market. The agreement, which is difficult to class from a legal point of view, describes Carter as the landlord and the Daniels as tenants, and recites that the landlord has agreed to let and the tenants to take certain specified fields. By cl. 1 the tenants are to have possession of the land for the purpose of growing

potatoes from the date of the agreement till the potatoes are fully ripe and in fit condition to be stored in pits, and then of so much thereof, or of other equally convenient land, for the purpose of pitting the seed and storing the potatoes in pits till they are sold. Clause 10 provides for the rent the tenants are to pay. This would confer an obvious interest in land to be occupied by the tenants. But cl. 8 provides that the landlord shall occupy the land and pay the rates and taxes due from him in respect of his holding. There are also included an elaborate set of provisions for cultivation. The landlord is to plough to ten inches deep, to supply and spread farmyard manure, and "when requested to cultivate and work the land" and to provide all the horse labour necessary for a number of specified operations. The tenants are to provide seed and artificial manure, and all manual labour necessary to drill, manure and plant seed, and to take up and pit the potatoes. Apparently the labour between planting and taking up is provided by the landlord. The potatoes are obviously the tenants' for the purposes of sale and the profits thereof. For the landlord's labour and horses and payment of rates and taxes the tenants pay 15*l.* per measured acre. In fact Carter has been assessed to Sch. B and rated as the occupier of the lands, and the Daniels have been assessed under Sch. D as carrying on the trade of potato growers and salesmen. The Special Commissioners struck out of the Daniels' assessment the profits of growing and selling these potatoes, except a conventional commission assigned to them as salesmen for selling their own potatoes. Rowlatt J. affirmed this decision, and the Crown appeals.

Sch. B is levied on occupiers, and "occupiers," who are charged with the tax under Sch. A with a power of deduction from the rent due to the owner, are defined in No. VII., r. 2, as persons having the use of the land. The term is probably used in the same sense as in the law of rating. That sense may be collected from the judgments of Lush J. in *Reg.* v. *St. Pancras Assessment Committee* (1) and of Buckley L.J. in *Liverpool Corporation* v. *Chorley Assessment Committee* (2),

(1) 2 Q. B. D. 581, 588. (2) [1912] 1 K. B. 270, 287.

C. A. 1924

BACK v. DANIELS.

Scrutton L.J.

and appears to involve possession of a permanent character such that trespass could be brought by the occupier with the enjoyment of a benefit from the land.

Now it is clear that at common law, for the same land, though hardly for the same portion of it, two persons may be in possession at the same time, and each can bring trespass. In the case of a grant by the owner of the soil of the right to herbage, vestura terræ, or growing crops, the owner can bring trespass for damage to his right to the soil; the person having a right to the herbage for damage to the herbage or crops; but neither could bring trespass for the damage to the other's right. Thus in *Rex* v. *Mayor, &c., of London* (1) the owners of the towpath could bring trespass for injury to the soil though they had granted the herbage and pasture of the towpath to another. In *Crosby* v. *Wadsworth* (2) the purchaser of a growing crop of grass brought trespass quare clausum fregit against persons who cut the grass, "he having the exclusive enjoyment of the crop growing on the land during the full period of its proper growth." In *Cox* v. *Glue* (3) the owner of the soil brought trespass for damage to the soil, though another had then exclusive possession of the close for the purpose of pasture, but the owner of the soil was held not to be able to bring trespass for damage to the pasture. The latter, according to Lord Coke (Co. Litt. 4b), could bring trespass quare clausum fregit for damage to the pasture. The growing crops before severance were not the subject of larceny at common law, for they were not separate chattels. The remedy was trespass quare clausum fregit, because they were still part of the land: see Pollock and Wright on Possession, p. 230.

In *Roads* v. *Overseers of Trumpington* (4) the Court had to deal with a similar case under rating law. The owner of land had let it to a farmer, reserving the minerals, i.e. coprolites, and a right of entry to get them. Coprolites were worked by removing the surface soil, digging up the coprolites and replacing the soil, only a small piece of land being worked

(1) (1790) 4 T. R. 21.
(2) 6 East, 602.
(3) 5 C. B. 533.
(4) L. R. 6 Q. B. 56.

at a time. The Court of King's Bench held that the grantee of the right to take coprolites was in exclusive occupation and could be rated, but it might be different if the landlord "had to do anything with the land, as drain it."

I agree with Mr. Ryde's view (Rating, 4th ed., pp. 56, 65) that exclusive occupation does not mean the power of excluding every one else from the land, but does mean the exclusive power of using the rights given him in the soil. From this point of view no one but the Daniels could use the land for growing potatoes; no one else could use the land for any purpose inconsistent with the Daniels' right to grow potatoes; the potatoes growing in the land were the Daniels' potatoes in the sense that if Carter or any one else dug them up or interfered with them the Daniels could bring trespass clausum fregit. This does not appear to me a mere incorporeal right in gross, which was not occupation and so could not be rated, as was held of sporting rights before the Rating Act, 1874: see *Hilton Overseers* v. *Bowes Overseers*. (1) It was a right in a portion of soil, enough to found an action of trespass against those who interfered with it. In *Cox* v. *Glue* (2) the jury seem to have found that the injury to the soil extended beyond the soil necessary for the right of pasture, to the soil still occupied by the owner, who could therefore bring trespass. It appears to me therefore that both the Daniels and Carter were in occupation of various portions of this field, which could be valued, the two together making up the annual value of the land.

The next question is whether a person who can be assessed as an occupier of land can without his consent be rated for a trade carried on, if that trade is only the use of the land for the purposes of husbandry. I say "without his consent," for such a person can under r. 5 elect to be assessed under Sch. D instead of under Sch. B. But no express power is given to the Crown to make such an election.

Cultivating land to grow produce for the purpose of sale is in my opinion a trade. But Parliament has dealt with that trade where it is exercised by the occupation of land, by

(1) (1866) L. R. 1 Q. B. 359. (2) 5 C. B. 533, 549.

C. A. 1924

BACK v. DANIELS.

Scrutton L.J.

assessing the occupier on the annual value of the land and not on the profits made out of its produce, unless the occupier himself elects to be so taxed. When there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation; but I do not think that the fact that the farmer sells his produce either on the farm or at the local market, or at Mark Lane, or even if he sells it in a shop, justifies an assessment under Sch. D as well as or in substitution for Sch. B.

I therefore agree with the Commissioners that the Daniels were occupiers of at any rate some part of the land in question, which prevented them being assessed under Sch. D, and with Rowlatt J.'s affirmance of their decision.

The appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondents: *Edward Betteley.*

W. I. C

[IN THE COURT OF APPEAL.]

C. A.
1925
Jan. 12.

KNIGHT *v.* PONSONBY.

[1923. K. 1211.]

Practice—Security for Costs—Permanent Address—Address correctly indorsed on Writ—Change of Address pendente lite—Inability of plaintiff through Poverty and Adversity to acquire fresh permanent Address.

There is no general rule of practice that security for costs will be required from a plaintiff who appears to have no permanent residence. If the address indorsed on the writ is not of a permanent character it may well afford grounds for ordering security, even in the absence of any suggestion that the address is an illusory or misleading one; but security cannot be required from a plaintiff who has indorsed a sufficient address on his writ and afterwards has been compelled to remove from that address and is prevented by poverty and adversity from acquiring a fresh permanent one.

Chellew v. *Brown* [1923] 2 K. B. 844 distinguished.

Decision of Acton J. reversed.

Appeal from Acton J. at chambers.

The action was brought by the plaintiff against the defendant for specific performance of an alleged agreement to enter into a partnership. The statement of claim alleged that the defendant agreed to purchase a half-share of the business of the plaintiff carried on by him at 8 Archer Street, Camden Town, and to pay 250*l.* therefor. The defence was a denial, and, further, that representations were made by the plaintiff which were not accurate, which induced the defendant to deposit 50*l.* (subject to a full investigation of the books being made) and to advance a sum of 31*l.* 4*s.* 3*d.* on an agreement that the plaintiff would, if negotiations fell through, refund the same. There was a counterclaim for the return of the 50*l.* and the 31*l.* 4*s.* 3*d.* The reply was in effect a denial of the statements contained.

The writ was issued on November 22, 1923, and the address of the plaintiff indorsed thereon was 140 Farringdon Road, London. There was very considerable delay on the part of the plaintiff in proceeding with the action, and numerous applications to the Court were made by the defendant to

C. A. 1925

KNIGHT v. PONSONBY.

compel the plaintiff to take the necessary steps in it. In November, 1924, the defendant ascertained from the plaintiff's solicitor that the plaintiff had been sold up both at the partnership premises and at Farringdon Road, and that he was then lying seriously ill at the Middlesex Hospital, where it was expected he would have to remain for some time. In December, 1924, the defendant applied to the Master for an order that the plaintiff should give security for costs, on the ground that he had ceased to have a permanent address. On December 11 the Master made an order that the plaintiff should give security for 50*l.* within seven days, and that, failing such security being given, the action should be dismissed with costs and that the defendant should be at liberty to sign final judgment against the plaintiff for the 50*l.* and 31*l.* 4*s.* 3*d.* referred to in the counterclaim. On December 19, 1924, this order was affirmed by Acton J.

The plaintiff appealed. The appeal was heard on January 12, 1925.

At the opening of the appeal counsel for the respondent admitted that he could not support that part of the order which gave liberty to the respondent to sign final judgment on the counterclaim.

E. C. Morey for the appellant. There is no power to make an order for security for costs unless the Court is satisfied that the address given by the plaintiff is illusory or fictitious. In this case it is neither: the plaintiff's only address is the Middlesex Hospital. It is poverty which prevents him having any other address.

The object of the practice reproduced by Order IV., r. 1, has been said to be (inter alia) to give the defendant full information as to the place where he might go for the purpose of settling the action: per Park J. in *Dawes* v. *Solomonson.* (1) Here the defendant actually went to see the plaintiff at the Middlesex Hospital to endeavour to settle the action.

In *Mee* v. *Denbigh* (2) the plaintiff was serving a term of twelve months' imprisonment and he gave the address of his

(1) (1838) 6 Scott, 596, 597. (2) (1883) 27 Sol. J. 617.

nephew. Chitty J. held that the address given was not within the terms of the rule, and said, "When the writ was actually issued he (the plaintiff) was in gaol, and he ought to have stated that he was residing there."

A hospital is as much an address as a prison or furnished room.

[EVE J. I cannot see that the plaintiff has any permanent address.]

The fact that the plaintiff has no fixed place of residence is not a sufficient ground for requiring him to give security for costs: *Chellew* v. *Brown*. (1)

The plaintiff has no fixed abode through poverty, and this was never a ground for ordering security. The plaintiff correctly described his address on the writ of summons, and he notified the defendant when he was in hospital.

F. van den Berg for the respondent. The order so far as it directed the plaintiff to give security for costs was rightly made. The practice is correctly stated in the Annual Practice, 1925, at p. 1315: "Security for costs may also be required from a plaintiff who appears to have no permanent residence, or to have changed his residence during the suit for the purpose of evading service." The only question is whether that practice has been altered by the decision in *Chellew* v. *Brown* (1), and it is submitted it has not. Frequently changing a place of abode may be a ground for ordering security for costs: *Player* v. *Anderson*. (2) Here the plaintiff has been sold up and has ceased to have a permanent residence. He is homeless and penniless.

[SCRUTTON L.J. You are drifting into the contention that the plaintiff is a poor man and therefore ought to give security, which is not the law.]

The established practice has been to require security to be given by a plaintiff who has no permanent address. The decision in *Chellew* v. *Brown* (1) must be confined to the class of persons there referred to.

The actual rule on which the question arises is r. 6 of Order LXV.

(1) [1923] 2 K. B. 844.

(2) (1846) 15 Sim. 104.

C. A. 1925

KNIGHT v. PONSONBY.

[POLLOCK M.R. referred to the observations of Bowen L.J. in *Cowell* v. *Taylor*. (1)]

It is admitted that poverty alone is not a ground for making the order.

[SCRUTTON L.J. referred to *Rhodes* v. *Dawson*. (2)]

The matter is largely one for the exercise by the Court of its discretion. One of the grounds on which the Court has ordered security to be given is that the plaintiff has no permanent address, and here the plaintiff has at the present moment nothing which can in any sense be called a residence.

E. C. Morey was not called upon to reply.

POLLOCK M.R. This appeal must be allowed. The action is brought by Mr. F. Knight against the defendant, Mr. Ponsonby, upon an allegation in the statement of claim that the plaintiff was the proprietor of a business in Camden Town and that defendant agreed to join him in that business, and to enter into partnership, and to pay certain moneys, and he brings this action, claiming by his writ repayment of certain moneys and specific performance of the agreement or in the alternative damages. The defence is that the whole matter was plainly and distinctly one which was based on fraud and fraudulent misrepresentation as to the nature and extent of the business, and that the defendant was so deceived as to be induced to enter into the agreement, and that he paid a sum of 50*l.* as a deposit, relying on what he now says was a fraudulent misrepresentation. And he contends that the fraud went to the root of the whole matter and claims to be entitled to be repaid the 50*l.*

The writ was issued on November 22, 1923, and it is only fair to say that the defendant has established that the action has been carried on in a very dilatory manner, showing that the plaintiff could have had very little faith in its success. The order for directions was not drawn up until after the defendant had taken out a summons to dismiss the action for want of prosecution. Two or three orders have been made that the plaintiff should proceed with the action.

(1) (1885) 31 Ch. D. 34, 38. (2) (1886) 16 Q. B. D. 548.

Finally an order was made that unless the plaintiff set his action down for trial within two days it should be dismissed.

The action has now been dragging on for six months and bears all the marks of being a dilatory and speculative action, as it is obviously a trumpery action.

The Master and the judge have ordered the plaintiff to give security for costs. The plaintiff is a person of no means and has no permanent address, both at his residence and business address he was sold up, as he told his solicitor. Therefore the plaintiff on his own showing stands in this position: He confesses that he has no business or other permanent address and that he has no means.

The Master made the order that the plaintiff should give security for costs on the ground that he had no permanent address. He also went further and ordered that unless the plaintiff should give the security within a fixed time his claim should be dismissed and that the defendant should be at liberty to sign judgment on a counterclaim he had set up in the action. The judge upheld that order. Mr. van den Berg for the defendant agrees that he cannot uphold that order so far as it relates to signing judgment on the counterclaim. I agree that that part of the order cannot stand and the appeal as to that must be allowed.

As to the first part of the order, it is contended it was wrong to order the plaintiff to give security for costs, because the order was in effect made merely on account of his poverty. At present the plaintiff is poor and in hospital suffering from illness which is likely to be prolonged.

It is clear that from time immemorial an order for security for costs has always been refused where the ground alleged was poverty. In *Cowell* v. *Taylor* (1) Bowen L.J. said: "The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity." Here we have the case of a poor man, and it clearly appears that it was owing to his poverty that he had no permanent residence. There is no evidence that he has misdescribed his residence or has avoided service

(1) 31 Ch. D. 34, 38.

C. A. 1925

KNIGHT v. PONSONBY.

Pollock M.R.

of proceedings, or that he is a nominal plaintiff. He is suing in his own interest. When one considers his present position it is clear that it is entirely due to his poverty that he has no permanent address and that he is in hospital. We must, therefore, be careful in dealing with this appeal, not to confuse the issues and require the plaintiff to give security so as in effect to stop the action. When once it is borne in mind that there is no ground for making an order for security for costs against the plaintiff merely on the ground of his poverty, then all the circumstances are explained, because his present position is entirely due to his poverty. I do not think that this is a case in which we are unduly overruling the discretion of the judge and Master, as the order made by them offends against the well established rule that no security for costs can be demanded merely on the ground of poverty. The plaintiff was a man of migratory habits, but that may also well be due to his poverty. I do not think that *Chellew* v. *Brown* (1) covers this case. There the plaintiff, who was a master mariner, gave his address on the writ as 87 Westbourne Terrace, where his sister lived, and where he had stopped for a fortnight in the year before the action was brought, and the argument was that he had mis-described his address on the writ, and it was held that the address given, having regard to his occupation, was sufficient, and security for costs against him was refused. Bankes L.J. pointed out that in a number of callings it was necessary for a man to pass from place to place, and the allegation in that case, which was not accepted, was that there had been an attempt to deceive by the plaintiff with respect to what his address was. That case therefore clearly does not cover the present case. It appears to me that this is a case which is entirely covered by the old-established rule that poverty is no bar. That really disposes of the whole matter. And although the plaintiff here may have slender hopes of succeeding in his action, that does not justify us in departing from that well-established rule. An undertaking on behalf of the plaintiff that he will notify the defendant when he

(1) [1923] 2 K. B. 844.

leaves hospital and where he then goes to, has been given. I think, therefore, for the reasons I have given that security for costs ought not to be required and that the appeal must be allowed.

SCRUTTON L.J. The plaintiff issued his writ and on the writ he gave his proper address. When the statement of claim was delivered the claim for specific performance was dropped and a claim was made for damages. The plaintiff had not much faith in his case and was not in a hurry to proceed with the action and had to be forced along by the defendant, and it may be a question whether the defendant was wise in so doing or whether it would not have been wiser on his part not to have aroused a sleeping dog. It appears that the plaintiff now no longer lives at 140 Farringdon Road, because he has been sold up and is now in hospital. When the defendant heard that the plaintiff was in hospital he applied for an order that the plaintiff should give security for costs. The Master made that order and also the further order that the defendant should be at liberty to sign judgment on his counterclaim if the plaintiff did not comply with the order on him to give security for costs within seven days.

The judge upheld the whole of that order, but I cannot conceive how the Master and the judge found themselves able to make the second part of the order. That part, however, of the order is not insisted on here and the only question is whether the first part of the order can stand.

It is quite clear that poverty of the plaintiff is not alone a sufficient ground for ordering him to give security for costs. In *Rhodes* v. *Dawson* (1) Lindley L.J. said: "There is nothing in my opinion to take this case out of the general rule, that the poverty and possible or probable bankruptcy of a plaintiff is not a ground for requiring him to give security for costs." It is also plain that if the plaintiff is ordinarily resident out of the jurisdiction he may be ordered to give security for costs. Buckley J., as he then was, in *In re Pretoria Pietersburg Ry. Co.* (*No.* 2) (2) said: "It is well

(1) 16 Q. B. D. 548, 555. (2) [1904] 2 Ch. 359, 361.

C. A. 1925

KNIGHT v. PONSONBY.

Scrutton L.J.

settled as a general rule that if a person resident abroad is an actor or plaintiff in proceedings in an English Court (not being a defendant in an action who is plaintiff in a cross-action, nor being a plaintiff suing a defendant who already has money of the plaintiff in his hands which in fact gives him security), and has not assets within the jurisdiction which can be reached, he may, except in special circumstances, be ordered to give security for costs." It is also clear that, if the plaintiff misdescribes or conceals his residence with a view to evade the consequences of his action, that is a ground on which an order will be made that he give security for costs. But here there has been no misdescription or concealment. The plaintiff has correctly stated where he is—namely, in hospital. The question therefore is whether the fact that he is unable to state a permanent address when the application is made is a sufficient ground to justify an order being made on him to give security for costs. I am unable to find in the authorities anything to justify us in laying that down as a general principle, and I think it would be very unfortunate if we were to do so. A person, such as the master mariner in *Chellew* v. *Brown* (1), may not have a permanent address, and in that case it was held that though the address of the plaintiff given on the writ was wrongly stated, though innocently, it was not sufficient ground for making an order on him to give security for costs. It is true it is not known where he will be, but that is due to the nature of his occupation. Take the case of a traveller being run down by a motor car and carried to a hospital, or that of a gipsy, it cannot be said that in such a case the absence of a permanent address would be sufficient to justify an order for security for costs, which might have the result of stopping the action. I am unable, as a matter of principle, to say that it is necessary for a plaintiff to have a permanent address within the jurisdiction if he is to avoid having to give security for costs. The appeal must be allowed.

EVE J. This is an application for security for costs; it is not founded on any allegation that the provisions of r. 1 of

(1) [1923] 2 K. B. 844.

Order IV. have not been complied with, but on the fact that the plaintiff has, pendente lite, ceased to have a permanent residence. The plaintiff has shown that this condition is due to poverty and adversity, and maintains that the Court will not in that state of things order him to give security. The question has been raised whether there is any general rule under which a plaintiff who, in the course of the action, ceases to have a permanent address, can be ordered to give security. It is clear that there may be many cases where persons for quite good reasons may not have any permanent address. A commercial traveller, for example, may be well content to dispense with any permanent residence, and to rest satisfied with the temporary accommodation he enjoys at the hotels in the various towns he visits—or again a person may choose to move about from hotel to hotel without making any particular one his headquarters. These considerations show, I think, that there can be no such rule of general application. Reliance has been placed on a statement in the Annual Practice that security may be required from a plaintiff who appears to have no permanent residence, but I think that statement must be read as applying only to the state of things at the date of the writ. If the address indorsed on the writ is not one of a permanent character it may well afford grounds for ordering security, even in the absence of any suggestion that the address is an illusory or misleading one, but I do not think that security can be required from a plaintiff who has indorsed a sufficient address on his writ and afterwards has to remove from that address and is prevented by poverty and adversity from acquiring a fresh permanent one. The appeal must therefore be allowed.

Appeal allowed.

Solicitor for appellant: *William Drake.*
Solicitors for respondent: *Fowler, Legg & Young.*

W. I. C.

1925
Jan. 14.

JARVIS *v.* SURREY COUNTY COUNCIL.

[1924. J. 344.]

Riot—Damage by Riot—Cause of Action—Refusal or Failure to fix Compensation—Limitation of Action—"Actions for penalties, damages, or sums of money given to the party grieved, by any statute"—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3—*Riot (Damages) Act,* 1886 (49 & 50 *Vict. c.* 38), *ss.* 2, 3, 4 *sub-s.* 1.

In an action against the police authority under the Riot (Damages) Act, 1886, for damages caused by a riot, the cause of action is the refusal or failure of the authority to fix compensation.

Such an action is not an action "for penalties, damages, or sums of money given to the party grieved, by any statute" within the meaning of s. 3 of the Civil Procedure Act, 1833; therefore the period for bringing an action limited by the section in respect of those actions is not applicable.

ACTION tried by Finlay J.

The plaintiff, Charles Arthur Jarvis, was in June, 1919, the owner and occupier o premises known as "Sports and Pastimes" and of a garage situate in part of a military camp called Witley Camp, Witley Common, Surrey, which part was known as "Tin Town." Tin Town consisted mostly of shops in which different articles were sold to the soldiers in camp. At that time the camp was occupied by Canadian troops, and on June 14 and 15, 1919, these troops, who had been in a discontented state for some time at what they considered was the undue delay in their demobilization after the war, broke out into a riot, in the course of which they destroyed the plaintiff's premises and garage. The plaintiff had received 750*l.* from the Canadian authorities in respect of his loss and now, under s. 2, sub-s. 1, of the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), claimed a further sum from the defendant council, who were the police authority of the county of Surrey. This further sum had been agreed between the parties at 1250*l.* The plaintiff made his claim against the defendants on June 24, 1919, and on January 7 and 27, 1920, letters were written to the defendants asking what was being done with regard to the claim, which the defendants

did not answer. The defendants definitely refused to fix compensation on January 29, 1924, and the writ was issued on February 1, 1924.

J. G. Hurst K.C. and *J. B. Melville* for the plaintiff. It was decided in *Pitchers* v. *Surrey County Council* (1), a case also under the Riot (Damages) Act, 1886, arising out of an earlier disturbance in this camp, that although soldiers only participated therein it was a riot, and that the camp was within the jurisdiction of the Surrey County Council. The cause of action here arose on the refusal and failure of the council to fix compensation under s. 4, sub-s. 1, of the Act, that is on January 29, 1924, when they finally refused by a letter of that date. The cause of action did not arise on the occasion of the infliction of the damage. Sect. 2 of the Act indicates the source from which the compensation payable is to be paid. Sect. 3 provides for the making of a claim. So far no right of action is given. Sect. 4, sub-s. 1, provides that where a claim for compensation has been made "and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation . . . . he may bring an action." It is then only that the cause of action arises, given by the section. It is said that there was a "failure" to fix compensation on the part of the defendants on some date earlier than January 29, 1924—namely, from some date a reasonable time after June 24, 1919, when the claim was made, and that the time limit, whatever it was, within which the action must be commenced began to run from that earlier date. But the plaintiff was a consenting party to the delay, as both sides wished to await the decision in *Pitchers* v. *Surrey County Council*. (1) In that case Swift J., on an interlocutory application, considered the present point and decided it in the plaintiff's favour. (2) Therefore the terminus a quo time begins to run is the refusal to fix compensation.

Secondly, the period of limitation in this case is twenty years under s. 3 of the Civil Procedure Act, 1833 (3 & 4 Will. 4,

(1) [1923] 2 K. B. 57.
(2) Unreported. Set out in the judgment of Finlay J. infra.

1925

JARVIS v. SURREY COUNTY COUNCIL.

c. 42), which fixes that limitation in the case of "all actions of . . . . debt upon any bond or other specialty." This is a specialty, inasmuch as it arises under an Act of Parliament. In *Shepherd* v. *Hills* (1) Parke B. said, not indeed that it would be a specialty, but that the period of limitation would be the same, and he referred to *Cork and Bandon Ry. Co.* v. *Goode* (2), an action for calls on shares. And it is clear that Scrutton L.J. in *Cohen* v. *Hall* (3) thought that it was a specialty, although he wrongly attributed that view to Parke B. in *Shepherd* v. *Hills* (4): see also the judgment of Maule J. in *Cork and Bandon Ry. Co.* v. *Goode.* (5) If the plaintiff's contention on this point is correct the action was brought in time whenever the cause of action arose. But it is said on behalf of the defendant that this action comes within the words of s. 3 of the Act of 1833, "actions for penalties, damages, or sums of money given to the party grieved, by any statute" which must be brought within two years of the cause of action, inasmuch as it is an action for a sum of money given to the plaintiff by a statute. But the words are controlled by the first word "penalties," and the words refer to what are known as "penal actions": see the judgment of Kekewich J. in *Thomson* v. *Lord Clanmorris* (6) and of Lindley M.R. in the same case in the Court of Appeal. (7) The Riot (Damages) Act imposes nothing in the nature of a penalty or punishment; it only gives compensation without the necessity of proving negligence or wrongdoing.

[*Shinman* v. *Lyons* (8) and *Kaufmann* v. *Liverpool Corporation* (9) were also referred to.]

Sir Leslie Scott K.C. and *L. F. C. Darby* for the defendants. As to the terminus a quo, the period within which the action could be brought began to run on the "failure" of the defendants to fix compensation, within the meaning of s. 3, which was at some date a reasonable time after the reception by the defendants of the plaintiff's claim, or of his letters

(1) (1855) 11 Ex. 55, 67.
(2) (1853) 13 C. B. 826.
(3) [1922] 2 K. B. 37, 42.
(4) 11 Ex. 55.
(5) 13 C. B. 826, 835.
(6) [1899] 2 Ch. 523, 528.
(7) [1900] 1 Ch. 718, 725.
(8) (1922) 38 Times L. R. 560.
(9) [1916] 1 K. B. 860.

dated January 7 and 27, 1920, asking what was being done with regard to the claim, which the defendants did not answer. The Act of 1886 is the last of a series dealing with damage by riot, and the Act which preceded it (7 & 8 Geo. 4, c. 31) made definite provision, by s. 3, that the action must be brought within three months "after the commission of the offence." The omission of Parliament to fix a limit in the present Act shows that they thought that one was in existence —namely, that under the Act of 1833. There is a distinction between cause of action and the question, one of procedure, when the litigation may be commenced. The cause of action arose when the damage was inflicted—see s. 2 of the Act of 1886—but the action could not be brought after two years from the "failure or refusal." The words in s. 1, "as hereinafter mentioned," do not take away its operative effect, and only refer to s. 5 dealing with the payment of compensation.

It is not enough for the plaintiff to show that he is claiming on a specialty; it must be for a "debt upon .... [a] specialty" within s. 3 of the Act of 1833. This is not an action for a debt but for damages: see Bullen and Leake's Pleadings, 3rd ed., p. 35, note (*a*). The statute enables the action to be brought, but it is not an action on the statute: see Maule J. in *Cork and Bandon Ry. Co.* v. *Goode.* (1)

[*Shepherd* v. *Hills* (2) was also referred to.]

No other statute of limitations applies, for the statute of James I. (21 Jac. 1, c. 16), s. 3, deals with cases where the defendant is in default, and this is not such a case: *Kaufmann Brothers* v. *Liverpool Corporation.* (3) Unless, therefore, the action comes within the words of s. 3 of the Act of 1833, "actions for penalties, damages, or sums of money given to the party grieved, by any statute," there is no limit of time fixed. It is within the word "damages," or at any rate it is within the last words. No doubt Lindley M.R. in *Thomson* v. *Lord Clanmorris* (4) did say that these words referred to penal actions, but Vaughan Williams L.J. put his

(1) 13 C. B. 826, 835.
(2) 11 Ex. 55.
(3) [1916] 1 K. B. 860.
(4) [1900] 1 Ch. 718, 725.

1925

JARVIS v. SURREY COUNTY COUNCIL.

decision on the ground that the Act in that case—as does the Act of 1886—had created a new duty and had left the plaintiff to his action on the case. Lindley M.R.'s words may be treated as obiter dicta. Both "damages" and money given by statute represent distinct legal conceptions; therefore they are not governed by the word "penalties."

Hurst K.C. in reply. This is as much an action of debt as is one on a solicitor's bill, which can be reduced on taxation. By regs. 5, 6 and 7 of the Regulations made under the Act of 1886 dated June 30, 1894 (1894, No. 636), fixed sums must be set out in the claim, and the action is then brought for that sum, which in default of agreement may be reduced by the Court.

FINLAY J. This case involves a point of some difficulty and interest. The action was brought by the plaintiff claiming an agreed sum by way of compensation for damage to his property at Witley caused by a riot on June 14 and 15, 1919. I need say nothing further as to the facts, which are similar to those in the report of *Pitchers* v. *Surrey County Council.* (1) There is no doubt that in the course of this unfortunate riot the plaintiff sustained the damage alleged. In respect of that loss he has already recovered 750*l.* from the Canadian military authorities, which was paid without any admission of liability. It has been agreed between the parties, subject to the legal points, that a further sum of 1250*l.* should be fixed as damages.

After listening to an argument of the greatest force on behalf of the defendants, I have come to the conclusion that I ought to decide in favour of the plaintiff. It is well to look quite shortly at the statute upon which the action was based, the Riot (Damages) Act, 1886. Sect. 2 grants compensation to persons suffering damage by riot, and s. 3 deals with the mode of compensation and gives power to a Secretary of State to make regulations for the making of claims. Sect. 4 enacts: "Where a claim to compensation has been made . . . . and the claimant is aggrieved by the refusal or failure of the

(1) [1923] 2 K. B. 57.

police authority to fix compensation . . . . he may bring an action against the police authority to recover compensation. . . . ." The plaintiff duly presented his claim for compensation. Sir Leslie Scott, for the defendants, contends that the cause of action arose at the date of the riot, and that that must be treated as the date from which any period of limitation begins to run. That point was decided by Swift J. in delivering judgment on an application by the defendants in *Pitchers* v. *Surrey County Council* (1) to amend their defence by adding a plea under s. 1 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). That learned judge said (2): "I shall not allow this amendment. In my view the cause of action here really only arose after the Council had failed to grant compensation. The Act of Parliament which gives a right of compensation prescribes the method in which it shall be obtained, and then goes on to provide in s. 4, sub-s. 1, that where a claim for compensation has been made in accordance with the regulations and a claimant is aggrieved by the refusal or failure of the police authority to fix compensation on such a claim, he may bring an action. It seems to me that he cannot bring an action until he is aggrieved by the refusal or failure of the police authority to fix compensation upon such claims."

No doubt Sir Leslie Scott is right in saying that, strictly speaking, I am not bound by that judgment, and I should not follow it if, after argument, I found myself unable to agree with it. But, after full argument, I am of the same opinion as Swift J., and the awkward results which would follow from the adoption of any other view are obvious. The scheme of the Act is that a plaintiff is not to have a right of action until he has been through the procedure indicated, and this procedure involves a certain amount of time and negotiation. It would be awkward if, while he was still negotiating, time should be running against a plaintiff.

Sir Leslie Scott then contended that, assuming that time begins to run only from the date on which the plaintiff is aggrieved by refusal or failure to fix compensation, the failure

(1) [1923] 2 K. B. 57.

(2) Unreported on this point.

1925

JARVIS v. SURREY COUNTY COUNCIL.

Finlay J.

was within a reasonable time after the receipt of two letters dated January 7 and January 27, 1920, from the plaintiff's then solicitors to the defendants, asking what was being done with regard to the claim which the defendants did not answer. I do not think there was at that time a failure or refusal. What was the cause of the delay I do not know, but it may be that it was caused by the desire of both parties to see what would happen in the case of *Pitchers* v. *Surrey County Council.* (1) In my opinion the plaintiff was not aggrieved by any refusal or failure within the meaning of s. 4, sub-s. 1, of the Act of 1886, until January 29, 1924, when the defendants finally refused to fix compensation. If I am right, that is the end of the case, because in any view of the other points raised the plaintiff's action is in time. But I think it right to give my view upon the very interesting question raised by Sir Leslie Scott on s. 3 of the Civil Procedure Act, 1833. By that section a limit of two years after the cause of action has arisen is fixed in the case of "actions for penalties, damages, or sums of money given to the party grieved by any statute." This case seems at first sight to fall precisely within the words " sums of money given to the party grieved by any statute." Here we have a sum of money given by a statute to a plaintiff who has suffered loss. But in my opinion I ought not to give effect to the argument that those words cover a case like the present case, because it seems to me that a contrary view has been taken in a case which I ought to follow—namely, *Thomson* v. *Lord Clanmorris.* (2) The question there arose under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), an Act passed in consequence of the decision of the House of Lords in *Derry* v. *Peek.* (3) In the former case Kekewich J. seems to have laid down what he conceived should be the principle to be applied in considering the very words which I have to consider in s. 3 of the Act of Will. 4. He says (4): " In the first place, although the words ' damages or sums of money given to the party grieved ' occur in the statute, yet they are

(1) [1923] 2 K. B. 57.
(2) [1899] 2 Ch. 523.
(3) (1889) 14 App. Cas. 337.
(4) [1899] 2 Ch. 523, 528.

connected with a reference to actions for 'penalties,' and I think that this part of the section is aimed at actions for penalties, and means damages or sums of money in the nature of penalties, and not sums of money such as we are dealing with here, representing compensation for loss suffered by persons who have subscribed for shares on the faith of untrue statements in a prospectus." The payments in that and in the present case are clearly compensation payable in respect of actual injury suffered by claimants, and bear no resemblance to a penalty. The Court of Appeal affirmed the judgment of Kekewich J. (1), and Lindley M.R. said (2): "In construing s. 3 of the Act of 1833, as indeed in construing any other statutory enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided. And when we look at the state of the law before the Act of 1833 we can see pretty plainly what was the mischief at which it was aimed. There were certain causes of action as to which there was no defined time of limitation. Some of them are enumerated in the earlier part of s. 3; for instance, 'actions of debt upon any bond or other specialty,' and others which are there mentioned. They were not provided for by the then existing Statutes of Limitations, and they are brought in. That was the first defect. There was another class of actions as to which there was no definite limitation of time—namely, 'actions for penalties, damages or sums of money given to the party grieved' by various Acts of Parliament, by way of penalty or punishment; not by way of compensation to the person injured, but where, as was pointed out by Lord Esher M.R., when commenting in *Saunders* v. *Wiel* (3) upon *Adams* v. *Batley* (4), punishment was the object; and where the money to be paid, whether it was called penalty, or damage or sum of money, was not assessed with the view of compensating the plaintiff, although he might put some of it in his pocket. That is the class of action which was

(1) [1900] 1 Ch. 718.
(2) Ibid. 725.
(3) [1892] 2 Q. B. 321, 323.
(4) (1887) 18 Q. B. D. 625.

1925

JARVIS v. SURREY COUNTY COUNCIL.

Finlay J.

contemplated by the latter part of s. 3. In other words, they were what are popularly called 'penal actions.' We arrive at this from the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured." It is quite true that Vaughan Williams L.J. puts the matter on a different footing, but we have the decision of Kekewich J. and Lindley M.R. that the latter part of s. 3 of the Act of 1833 refers to penal actions. I should be failing in my duty, in view of these judgments, if I decided in favour of Sir Leslie Scott's argument. I may add, that apart from authority there would be considerable force in the contention that where a statute speaks of actions for sums of money given to a party grieved, the words are apt to cover a case like the present one. But I am bound by authority to decide against that contention.

I do not propose to decide anything more, although other interesting points were raised. All I will say is that I am not at present convinced that this is a debt upon a specialty. If it is not, and it does not fall within the other part of the section, there is no statutory limitation in force applicable to this action.

I must give judgment for the plaintiff for the agreed sum.

Judgment for plaintiff.

Solicitor for plaintiff: *W. Ewart Craigen.*

Solicitors for defendants: *Wyatt & Co., for T. W. Weeding, Kingston-on-Thames.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1924
Oct. 23.

ABRAHART *v.* WEBSTER.

Landlord and Tenant—Rent Restriction—Dwelling-house—Part of House—Separate Dwelling—Reconstruction of Rest of House—Self-contained Tenements—Apportionment of Rent—Rent Restrictions Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 2, 3, 8, 9.

By s. 12, sub-s. 8, of the Rent Restrictions Act, 1920, any rooms in a dwelling-house subject to a separate letting as a dwelling-house are, for the purposes of the Act, to be treated as "a part of a dwelling-house let as a separate dwelling." By sub-s. 2 the Act is to apply to "a part of a house let as a separate dwelling," where the standard rent or rateable value does not exceed the statutory limits, "and every such . . . . part of a house shall be deemed to be a dwelling-house to which this Act applies." . . . . By sub-s. 3: "Where, for the purpose of determining the standard rent . . . . of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, ... the county court may, on application by either party, make such apportionment as seems just." . . . . By sub-s. 9 the Act is not to apply to "any dwelling-house" which has since April 2, 1919, been bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements.

A dwelling-house which was within the Rent Restrictions Act, 1920, consisted of a basement and three upper floors. In 1921 the basement was let to a tenant at 11*s.* 9*d.* a week on a separate tenancy as a dwelling-house. In 1923 the landlady, without touching or affecting the basement, reconstructed the upper floors by way of conversion into two separate and self-contained tenements, the lower of which was shut off from the basement by a door bolted on both sides. The basement had a separate access from the street. In 1924 the tenant of the basement applied to the county court for an order apportioning the standard rent of the basement as on August 3, 1914:—

Held, that the reconstruction of the upper floors had not the effect of withdrawing the basement, which was a separate dwelling-house, from the operation of the Act.

Decision of Divisional Court [1924] 2 K. B. 342 reversed.

APPEAL from the decision of the Divisional Court. (1)

The applicant, William C. A. Abrahart, was the tenant of the basement of a dwelling-house, No. 3 Goldstone Villas, Hove, to which the Rent Restrictions Act, 1920, applied. The house consisted of a basement, ground floor, first floor, and second floor. From August 3, 1914, onwards, it had

(1) [1924] 2 K. B. 342.

C. A. 1924

ABRAHART v. WEBSTER.

been the subject of the various tenancies assignments and surrenders following :—

On August 3, 1914, one Dr. Treutler was the tenant of the whole house at a rent of 60*l.* a year, which was the standard rent of the house on that date. He died in March, 1915, and his widow remained in possession until about March, 1917. On November 11, 1917, Hyman Livovitch became tenant of the whole house and remained in possession until September, 1918. He was succeeded as tenant by Miss A. J. Browning, who became tenant of the whole house on November 15, 1918.

On February 6, 1920, the applicant became tenant to Miss A. J. Browning of the basement, except a small room called the slip room, and of two rooms on the top floor. At that time Miss E. Sutton was sub-tenant of two unfurnished rooms on the first floor, and certain other portions of the premises were sub-let furnished. On September 29, 1920, Miss Browning's tenancy came to an end and she left. Soon afterwards Miss E. Sutton also left.

Mrs. Webster, the respondent, purchased the property on January 4, 1921, from Dr. Boyes. In February, 1921, the applicant surrendered the two rooms which he had theretofore held on the top floor, and retained possession of the basement, except the slip room, upon a new tenancy at 11*s.* 9*d.* a week. In March, 1921, Miss Lippman took a tenancy of the whole house furnished, except the rooms in the basement occupied by the applicant. On September 14, 1923, Miss Lippman gave up her tenancy.

In September, 1923, the respondent made certain alterations to the house with a view of converting the part above the basement into two separate tenements. On the ground floor a partition was erected with a door bolted on both sides shutting off the staircase, which formerly led from the basement, and a new water-closet and bathroom were added. On the first floor one bedroom was converted into a kitchen with a sink, gas stove, and the necessary connections. The top floor and first floor after the alterations became a separate maisonette ; the ground floor became a separate flat. The county court judge found as a fact that the newly constructed

tenements could not be identified with the house as it was before the alterations, and that to this extent the house had lost its identity. The applicant continued to occupy two rooms and a scullery in the basement as formerly, and the slip room was unoccupied, but remained at the disposal of the respondent. No alteration whatever was made to the basement, which remained exactly as it was before the alterations. The applicant's rooms derived no benefit directly or indirectly from the alterations. They continued to be occupied by him as a separate tenement with a separate entrance from the street. The alterations were finished in November, 1923.

In these circumstances the applicant applied to the county court of Brighton under s. 12, sub-s. 3, of the Rent Restrictions Act, 1920 (1), to have the rent of the basement apportioned.

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed—

(*a*) In the Metropolitan Police District . . . . 105*l*.

(*b*) In Scotland, 90*l*.

(*c*) Elsewhere, 78*l*.

And every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies: Provided," etc.

Sub-s. 3: "Where, for the purpose of determining the standard rent . . . . of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed . . . . the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

Sub-s. 8: "Any rooms in a dwelling-house subject to a separate letting wholly or partly as a dwelling shall, for the purposes of this Act, be treated as a part of a dwelling-house let as a separate dwelling."

Sub-s. 9: "This Act shall not apply to a dwelling-house erected after or in course of erection on April 2, 1919, or to any dwelling-house which has been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements; but, for the purpose of any enactment relating to rating, the gross estimated rental or gross value of any such house to which this Act would have applied if it had been erected or so reconstructed before August 3, 1914, and let at that date, shall not exceed—

(*a*) If the house forms part of a housing scheme to which s. 7 of the Housing, Town Planning, &c., Act, 1919, applies, the rent (exclusive of rates) charged by the local authority in respect of that house; and

(*b*) In any other case the rent

C. A. 1924

ABRAHART v. WEBSTER.

The registrar fixed the standard rent of the whole house, before the alterations, at 60*l.*, and apportioned one-fifth of this as the rent of the basement. The landlord appealed, and the county court judge affirmed the registrar. The landlord then appealed to the Divisional Court and that Court reversed the decision of the county court judge and held that the Rent Restrictions Act, 1920, no longer applied, inasmuch as the dwelling-house, which in the opinion of the Court meant the whole house, had since April 2, 1919, been bona fide reconstructed by way of conversion into two or more separate or self-contained tenements, within the meaning of s. 12, sub-s. 9, of that Act.

The tenant appealed.

Raymond Jennings for the appellant. The decision of the Divisional Court is wrong and that of the county court judge should be restored. By s. 12, sub-s. 8, of the Rent Restrictions Act, 1920, any rooms in a dwelling-house, subject to a separate letting as a dwelling (which exactly describes the basement of which the appellant was and is the tenant), are to be treated for the purposes of the Act as "a part of a dwelling-house let as a separate dwelling." By sub-s. 2 the Act applies to "a part of a house let as a separate dwelling," where the annual rent or value does not exceed the statutory limit, "and every such . . . . part of a house shall be deemed to be a dwelling-house" to which the Act applies. Therefore before the alterations were made the appellant was the tenant of a dwelling-house within the Act. By sub-s. 3, where for the purpose of determining the standard rent of this dwelling-house it is necessary to apportion the rent of the property in which the dwelling-house is comprised, the county court may on the application of either party, and therefore on the application of the tenant, make such apportionment as seems just. By sub-s. 6, where the Act has become applicable to a dwelling-house, it continues to apply, whether or not

(exclusive of rates) which would have been charged by the local authority in respect of a similar house forming part of such a scheme as aforesaid."

the dwelling-house continues to be one to which the Act applies.

[SCRUTTON L.J. That does not apply where the former dwelling-house has lost its identity: *Phillips* v. *Barnett* (1); *Prout* v. *Hunter*. (2)]

Nothing of that sort has happened to the basement. The registrar and the county court judge have expressly found that the basement was unaffected by the alterations, but remained exactly as it was before them. In that case sub-s. 6 applies: *Sutton* v. *Begley*. (3) It would be contrary to the whole tendency of this legislation if a landlord could let part of a house and then, by retaining other parts of it and converting them, deprive the tenants of their rights. Some cogent reason must be offered before the Court will be driven to that conclusion. The only reason offered is that by sub-s. 9 the Act ceases to apply to a dwelling-house which has been since April 2, 1919, reconstructed by way of conversion into two or more separate and self-contained tenements. That argument breaks down on the facts, because the dwelling house has not been reconstructed, but only a portion of it. The judgment of Atkin L.J. in *Sinclair* v. *Powell* (4) is strongly in favour of the appellant. "If," said the Lord Justice, "the part of a house was not let as a separate dwelling in August, 1914, you may show that substantially in the form in which it now is it existed and was let as part of a whole house or a larger tenement in August, 1914, and can get the rent apportioned." The basement as it now is was let as part of a whole house. The judgment continues: "But if the part has been substantially altered so that you cannot fairly predicate of it that in its present form it was, as part of a whole, let in 1914, I do not think that apportionment is possible." In the present case there has been no alteration of the part.

Bertram Long for the respondent. The case turns on the meaning of "dwelling-house" in s. 12, sub-s. 9. The Act is not to apply to "any dwelling-house" which has been since

(1) [1922] 1 K. B. 222.
(2) [1924] 2 K. B. 736.
(3) [1923] 2 K. B. 694.
(4) [1922] 1 K. B. 393, 407.

C. A. 1924

ABRAHART v. WEBSTER.

April 2, 1919, bona fide reconstructed by way of conversion. Has No. 3 Goldstone Villas been since that date bona fide reconstructed by way of conversion ? The answer is, it has. Therefore the Act does not apply to 3 Goldstone Villas.

[SCRUTTON L.J. If a third floor had been added since 1914 and constructed as a separate and self-contained flat, would the whole dwelling-house have been reconstructed since that date, or would the flat have been a dwelling-house erected since that date ?

ATKIN L.J. If the first and second floors had been destroyed by fire could there be no apportionment of the basement and ground floor ?]

It may be so. And it may be that a landlord by retaining part of a house may defeat the rights conferred upon tenants by the Act. Even if that is the effect of s. 12, sub-s. 9, the ordinary meaning is to be given to its language. It is idle to say that the basement was unaffected by the alterations. It was formerly the basement of a dwelling-house. Now it is a self-contained tenement.

[*Stockham* v. *Easton* (1) was also cited.]

Counsel was not called upon in reply.

BANKES L.J. This appeal turns on the proper construction of s. 12, sub-s. 9, of the Rent Restrictions Act, 1920. The premises in question consist of a basement, ground floor, first floor, and second or top floor. In 1914 and onwards they were let as a whole unfurnished to a tenant at a yearly rent of 60*l*., which brought them within the Rent Restriction Acts. Some years later, in 1920, the basement and two rooms on the top floor were let to the appellant. Either then, or in 1921, when he surrendered the two rooms on the top floor and entered into a contract of tenancy for the basement only, the basement became a dwelling-house ; or, if the slip room is taken into account, the rooms which he occupied were by s. 12, sub-s. 8, to be treated as part of a dwelling-house let as a separate dwelling, and therefore they became a dwelling-house within sub-s. 2.

(1) [1924] 1 K. B. 52.

While the appellant was in occupation of this dwelling-house the landlady altered the ground floor and other floors of the building above and made them into two separate tenements. In these circumstances the appellant applied to the county court under s. 12, sub-s. 3, of the Act to have the rent of the building apportioned for the purpose of determining the standard rent of his dwelling-house.

It was argued that he had no right to have the rent apportioned, because he was not the tenant of a dwelling-house within the Act, the dwelling-house having been since April 2, 1919, bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements, and thereby taken out of the Act by s. 12, sub-s. 9; and the Divisional Court, reversing the judge and the registrar of the county court, have given effect to this argument. The reasoning of the Divisional Court is put in a nut shell by Barnson J. (1): "The word dwelling-house . . . . in that sub-section"—s. 12, sub-s. 9—"must, I think, be used in its ordinary sense and must refer to the whole structure as a unit." I cannot accept that construction. To put the case suggested by Scrutton L.J. during the argument: If the landlady had added a third floor and had let it as a separate tenement, it would surely be a dwelling-house erected after April, 1919, and as such it would be withdrawn from the operation of the Act by s. 12, sub-s. 9, and that notwithstanding the provision relating to the rates of such a dwelling-house, which does not in my opinion touch the question we have to decide. Another instance was put by Atkin L.J.: What would be the position of the tenant of the basement if the first and second floors had been destroyed by fire and a new dwelling-house had been erected in their place? Counsel for the respondent had some difficulty in answering that in these circumstances the tenant could not have the rent of the building apportioned. Surely the tenant of the basement is in either of these cases to be treated as occupying a dwelling-house, and is within his rights in insisting that he is still within the Act and entitled to the benefit of the Act,

(1) [1924] 2 K. B. 346.

C. A. 1924

ABRAHART v. WEBSTER.

Bankes L.J.

notwithstanding that other dwelling-houses superimposed upon his dwelling-house have been so altered that they are taken out of the Act. That appears to me to be the plain reading of sub-s. 9. The appeal must be allowed, the judgment of the Divisional Court must be set aside and that of the county court restored.

SCRUTTON L.J. It is clear from sub-ss. 2 and 8 of s. 12 that the expression "dwelling-house" is used either of a whole building, or of part of it subject to a separate letting as a dwelling, which "shall be treated as a part of a dwelling-house let as a separate dwelling," and so is included in the term "dwelling-house." It follows that one dwelling-house may contain two or three others, and confusion may be the consequence. Turning to sub-s. 9, and bearing in mind that a dwelling-house may include within its dimensions a dwelling-house erected after April 2, 1919; if on top of a building with three floors a self-contained flat is erected after April, 1919, that would be a dwelling-house first erected after April 2, 1919, and the Act would not apply to it; it was not the object of the Act to put unnecessary obstacles in the way of building new dwellings. In my view the present case affords a typical instance of what is meant by the words "or to any dwelling-house which has been since that date . . . . bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements." At one period in the history of these premises the three floors above the basement were let to Miss Lippman. They were then reconstructed into two separate and self-contained flats or tenements, and thereupon that portion of the house which had been let to Miss Lippman was taken out of the Act. But there still remained within the Act the basement, which was unaffected by the alterations and has never ceased to be part of the premises let as a whole in 1914. From the wording of sub-s. 3, which enables either party to apply to the county court to have the rent apportioned, it is clear that the word "dwelling-house" is used in the secondary sense of a dwelling-house within a dwelling-house, and that the phrase

"the property in which that dwelling-house is comprised" is used to describe the original dwelling-house. In a building of three storeys, one of which is let as a flat, the three storeys would be "the property in which that dwelling-house is comprised," and the "dwelling-house" would be the flat. This leads to the conclusion that the county court judge and the registrar took the right view and that this appeal should be allowed.

ATKIN L.J. I agree. The first answer of the landlord to the tenant's application to have the rent apportioned is that by virtue of s. 12, sub-s. 9, the Rent Restrictions Act, 1920, no longer applies to the tenement, because the dwelling-house of which it forms part has since April 2, 1919, been bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements, and therefore, although the tenant's tenement is a separate dwelling-house, and although that dwelling-house remains exactly as it was unaffected by the conversion, yet, inasmuch as the landlord has reconstructed the rest of the house, the exemption from the operation of the Act applies to the whole content of the house including the tenant's tenement. There is no reason for such a conclusion. It would frustrate the purpose of the Act. It would enable a landlord, by keeping part of a house in his own possession, to defeat the rights of the tenants of the rest of the house; and I find it impossible to believe that such a conclusion was ever contemplated by the Legislature. The true meaning of sub-s. 9 is that if the landlord reconstructs the whole of the dwelling-house by way of conversion of the whole of the dwelling house into two or more separate and self-contained flats or tenements, then the Act no longer applies to any part; if he converts part of the dwelling-house, then the Act no longer applies to that part which has been converted. That is the simple and natural meaning of the Act.

I do not consider *Stockham* v. *Easton* (1) relevant to this part of the case. Its proper bearing is upon the landlord's

(1) [1924] 1 K. B. 52.

C. A. 1924

ABRAHART v. WEBSTER.

Atkin L.J.

second answer—namely that, independently of the suggestion that the Act no longer applies owing to sub-s. 9, the whole house by reason of the alterations has lost its identity and, whatever may be said of the rest of the Act, s. 12, sub-s. 3, the apportionment section, cannot apply to the respondent's dwelling-house, because there is no longer any property in which that dwelling house is comprised and therefore there can be no rent of that property to be apportioned. That is an argument founded on *Phillips* v. *Barnett*. (1) The answer is that the county court judge confirming the registrar has found as a fact that no alteration whatever was made to the basement, and that the respondent's rooms derived no benefit, directly or indirectly, from the alterations. If so there is no reason why the rent of the property as it stood before the alterations should not be apportioned. That has been done, and I see no reason for interfering with the judgment of the county court judge.

Appeal allowed.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth, for Graham-Hooper & Betteridge, Brighton.*

Solicitors for respondent: *Cox & Cardale, for Howard Gates & Ridge, Hove.*

(1) [1922] 1 K. B. 222.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1924
Oct. 28, 29.

PRINGLE *v.* HALES.

County Court—Practice—Commencement of Action—Leave of Court—Summons issued before Leave—Jurisdiction—Irregularity—Waiver—Limitation of Time—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 74—*County Courts Act*, 1919 (9 & 10 *Geo.* 5, *c.* 73), *s.* 10, *sub-s.* 1—*County Court Rules*, 1903 *and* 1923, *Order* v., *r.* 13; *Order* vii., *r.* 2—*Rent Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 8, *sub-s.* 2.

On January 30, 1924, a tenant of a dwelling-house within the Rent Restrictions Acts lodged two plaints in the West London county court, the one under s. 12, sub-s. 3, of the Act of 1920, for apportionment of rent, and the other under s. 14, sub-s. 1, of the same Act for certain sums paid by him in respect of rent which, as he alleged, was irrecoverable by his landlord. These sums were, by s. 8, sub-s. 2, of the Act of 1923, recoverable on or before January 31, 1924, but not afterwards. The claim for apportionment could regularly be brought in the West London court, but the claim for repayment could not be brought in that court without the leave of the judge or registrar on an application supported by an affidavit. No affidavit was sworn until February 5, 1924. Notwithstanding this the plaint was entered, a plaint note under the seal of the court was given to the plaintiff, and a summons was issued, all bearing the date January 30, 1924. By Order vii., r. 2, of the County Court Rules a summons to appear to a plaint shall be dated of the day on which the plaint was entered, and the date thereof shall be the commencement of the action:—

Held, that the irregular entry of the plaint and issue of the summons before the necessary leave had been obtained did not deprive the county court of jurisdiction to hear the action, but that the irregularity could be waived by the defendant; that as the defendant had appeared to the summons and raised a defence in no way challenging the jurisdiction of the court, he had waived the irregularity; that the action must therefore be taken to have commenced on January 30, and that the plaintiff was entitled to recover.

Judgment of the Divisional Court reversed.

Appeal from the judgment of a Divisional Court.

The plaintiff was tenant to the defendant of a garage and two rooms at No. 3 Ebury Mews within the district of the West London county court. The premises were within the operation of the Rent Restrictions Acts, 1920 and 1923. The defendant was a retired builder living at 20 Endlesham Road, S.W., within the district of the Wandsworth county court.

On January 30, 1924, the plaintiff went to the West London

C. A. 1924

PRINGLE v. HALES.

county court and lodged two plaints, one for apportionment of his rent under s. 12, sub-s. 3, of the Rent (Restrictions) Act, 1920, and the other for the recovery of certain sums which he alleged he had paid in excess of what was recoverable by the defendant as rent. Upon the first plaint a summons issued of course by virtue of s. 73 of the County Courts Act, 1888 (1), and r. 1 of the Rent (Restrictions) Rules, 1920.

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 73: "On the application of any person desirous to bring an action under this Act, the registrar of the court shall enter in a book to be kept for this purpose in his office a plaint in writing, stating the names and the last known places of abode of the parties, and the substance of the action intended to be brought, every one of which plaints shall be numbered in every year according to the order in which it shall be entered; and thereupon a summons, stating the substance of the action, and bearing the number of the plaint on the margin thereof, shall be issued under the seal of the court, according to such form, and be served on the defendant so many days before the day on which the court shall be holden at which the action is to be tried, as shall be prescribed, and delivery of such summons to the defendant, or in such other manner as shall be so prescribed, shall be deemed good service; and no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known."

Sect. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of commencement, or, with the like leave in the court in the district of which the cause of action or claim wholly or in part arose."

County Courts Act, 1919 (9 & 10 Geo. 5, c. 73), s. 10: "(1.) Where an action or matter is commenced in a county court, which ought to have been commenced in some other county court, the judge may, if he thinks fit, and upon such terms as to costs and otherwise as he thinks fit, instead of ordering it to be struck out in accordance with s. 114 of the principal Act, either transfer the action or matter to the county court in which it ought to have been commenced or proceed to hear and determine the case in the court in which it was commenced, and in the latter case that court shall have jurisdiction in like manner as if it had been the court in which the action or matter ought to have commenced." . . . .

County Court Rules, 1903 to 1923, Order v., r. 13: "(1.) Where leave to enter a plaint is required under s. 74 of the Act, an application shall be made upon the affidavit of the proposed plaintiff or of some

Upon the second a summons could only issue on an application to the judge or registrar of the Court supported by an affidavit in accordance with s. 74 of the Act and Order v., r. 13, of the County Court Rules, 1903 to 1923.(1) No such affidavit was sworn until February 5, 1924; nevertheless a plaint note and a summons were both stamped in the county court with the date January 30, and particulars of claim bearing the same date were delivered by the plaintiff stating that on December 24, 1920, the defendant had let to the plaintiff the premises for three years from December 25, 1920, at the rent of 65*l.* a year; that the plaintiff had commenced proceedings for the apportionment of his rent in the West London county court; that he had paid during the three years up to December 25, 1923, 195*l.* for rent; that on the basis of a properly apportioned rent he would only have paid 96*l.* for the three years, and that he had thus overpaid 99*l.*, which he claimed.

The defendant in his particulars of defence insisted that

person on his behalf who has knowledge of the facts, setting forth the facts on which the application is grounded." . . . .

Order VII., r. 1: "At the time of entering a plaint the registrar shall give to the plaintiff a note under the seal of the court, according to such one of the forms in the appendix as shall be applicable to the case, with a memorandum thereon according to the form in the appendix." . . . .

Rule 2: "A summons to appear to a plaint shall be according to one or other of the forms in the appendix, and shall be dated of the day on which the plaint was entered, and the date thereof shall be the commencement of the action."

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 14, sub-s. 1: "Where any sum has, whether before or after the passing of this Act, been paid on account of any rent . . . . being a sum which is by virtue of this Act . . . . irrecoverable by the landlord . . . . the sum so paid shall be recoverable from the landlord . . . . who received the payment . . . . by the tenant by whom it was paid, and any such sum, and any other sum which under this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may . . . . be deducted by the tenant . . . . from any rent . . . . payable by him to the landlord." . . . .

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 8, sub-s. 2: "Any sum paid by a tenant . . . . which under s. 14, sub-s. 1, of the principal Act"—the Act of 1920—"is recoverable by the tenant . . . . shall be recoverable . . . . in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act"—July 31, 1923,—"but not afterwards."

(1) See note (1) ante, p. 574.

C. A. 1924

PRINGLE v. HALES.

no more than 6*l.* 5*s.* was recoverable, and that the rest of the claim was barred by s. 8, sub-s. 2, of the Rent Restrictions Act, 1923, because it had been paid to him before the date of the passing of the Act—namely, July 31, 1923, and could not now be recovered before March 6, 1924, the day appointed for the hearing of the case, being the first day on which, as he contended, the amount claimed or any part thereof was "recoverable" within the meaning of that section, and being more than six months since July 31, 1923. He paid 6*l.* 5*s.* into court, as this sum had been paid since September 6, 1923.

On March 6, 1924, the case thus constituted came before the judge of the West London county court, who held on the authority of *Morris* v. *Duncan* (1) that "recoverable" in s. 8, sub-s. 2, of the Act of 1923, meant recoverable by judgment. He therefore gave judgment for the defendant.

The plaintiff appealed, and the Divisional Court dismissed the appeal on the ground that the county court had no jurisdiction to enter the plaint or issue the summons before February 5, by which time the plaintiff's claim for the balance above 6*l.* 5*s.* was barred, and that the Court itself had no jurisdiction to extend the time within which the action was to be commenced. The plaintiff by leave appealed to the Court of Appeal.

John Duncan for the appellant. By s. 8, sub-s. 2, of the Rent Restrictions Act, 1923, so much of the rent as was overpaid by the appellant before July 31, 1923—the date of the passing of the Act—is "recoverable" within six months from that date. The county court judge was wrong in holding that "recoverable" meant recoverable by judgment; it is sufficient if the action is commenced within six months from the passing of the Act: *Lewis* v. *McKay* (2); *Diment* v. *Roberts*. (3) It is clear from Order VII., r. 2, of the County Court Rules that this action was commenced on January 30, 1924, and within the prescribed six months. The plaint was entered on that day in the West London court and the

(1) [1899] 1 Q. B. 4.

(2) [1924] 2 K. B. 136.

(3) Ante, p. 9.

summons issued on the same day from the same court. The respondent contends that the plaint ought not to have been entered and the summons ought not to have issued before February 5; but, assuming this contention to be correct, the result is not to deprive the county court of jurisdiction. The court had jurisdiction under s. 10, sub-s. 1, of the County Courts Act, 1919. At the worst there has been an irregularity in the practice or procedure of the court. Irregularities in practice and procedure may be waived: *Jones* v. *James* (1); *Moore* v. *Gamgee* (2); *Smythe* v. *Wiles* (3); *Shrager* v. *Basil Dighton, Ld.* (4) The respondent waived the irregularity by appearing in the county court and electing to rely upon the point that the appellant had not recovered judgment before January 30, 1924.

A. Ralph Thomas contra. The respondent is entitled to retain the judgment in his favour. All the proceedings in the county court before February 5 were null and void. The plaint could not properly be lodged in the West London court, the plaint note could not be delivered, and the summons could not issue before February 5, too late for the appellant, whose claim was barred six days before February 5. Until that date the court had no jurisdiction over the case, and this defect of jurisdiction is apparent on the face of the record. The court has often refused to amend its record if the result of the amendment would be to enable a plaintiff to recover a debt which, but for the amendment, would be barred by statute. In *Campbell* v. *Smart* (5) two writs had been issued, the second in continuation of the first. The second writ expired. The day after its expiry the plaintiff attempted to issue a third writ, but by that time his claim had been barred by the Statute of Limitations. He then applied for leave to antedate the first writ by two days and make corresponding alterations in the subsequent writs, so as to save his claim from being barred; but the court refused leave. This is not merely an irregularity which can be

(1) (1850) 19 L. J. (Q. B.) 257.
(2) (1890) 25 Q. B. D. 244.
(3) [1921] 2 K. B. 66.
(4) [1924] 1 K. B. 274.
(5) (1847) 5 C. B. 196.

C. A. 1924

PRINGLE v. HALES.

waived. In *Clarke* v. *Smith* (1) Wightman J., not having been informed that the plaintiff's claim was barred on July 13, 1851, allowed the date of the writ to be altered from July 13 to July 11. The defendant appeared to the writ so amended; but the court held that there was no power to alter the date so as to deprive the defendant of the benefit of the statute. *Doyle* v. *Kaufman* (2) is to the same effect. This is a point which, although it was not taken in the county court, can be raised on appeal: *Waller* v. *Thomas* (3); it is an error which is patent upon the record.

Duncan in reply.

BANKES L.J. The appellant in this case seeks to recover rent which he says he has been charged in excess of what the Rent Restrictions Acts allow to the landlord. As regards so much of this rent as was paid before the passing of the Act of 1923, the action to recover that amount must have been brought within six months of the passing of the Act. Those six months elapsed on January 31, 1924. The question is, did the appellant commence his action within the statutory time? He sought to commence it in the West London county court, but that was a court in which he could only commence proceedings by leave of the judge or registrar, and leave is obtainable only on an application supported by an affidavit. The necessary affidavit was not sworn before February 5, and if the proceedings had been regular there would have been no action commenced before February 5, which was too late for the appellant to recover the rent he was claiming. But, for some unexplained reason, an official at the county court issued a plaint note to the plaintiff dated January 30, and allowed the summons to issue bearing the same date. The proper procedure to be followed is regulated by ss. 73 and 74 of the County Courts Act, 1888, from which it is plain that the plaint must precede the summons, and that the action can only by leave of the judge or registrar be commenced in a court other than that court in the district

(1) (1858) 2 H. & N. 753. (2) (1877) 3 Q. B. D. 7, 340.
(3) [1921] 1 K. B. 541.

C. A. 1924

PRINGLE v. HALES.

Bankes L.J.

of which the defendant dwells or carries on business. But the result of what has happened is that the action in fact commenced on January 30, 1924, although in the circumstances it ought not to have commenced until February 5. This result is due to Order VII., r. 2, of the County Court Rules, which provides that the date of the summons shall be the commencement of the action. The date of the summons is plainly January 30; it is equally plain that it ought not to have been dated January 30. What is the effect of this? Is it a circumstance which deprived the West London county court of all jurisdiction, or is it merely an irregularity which has occurred in a matter within the general jurisdiction of that court and which therefore can be waived by the defendant taking no objection and proceeding as if it had not occurred? In my opinion it was an irregularity of the kind which could be waived, and in the circumstances it was waived by the respondent. He appeared to the summons. He did not object to the form of the summons, but knowing the judge's view of the meaning of the word "recoverable" in s. 8 of the Rent Restrictions Act, 1923—namely, that the sum must be recovered by action—he gave the go by to the date of the summons and relied on the point that the appellant had not within six months of the passing of the Act recovered judgment, as distinguished from bringing the action, for the amount claimed.

By so doing he has precluded himself from attempting to support the judgment in his favour by an argument impeaching the jurisdiction, even if he could now make use of that point, which he had not taken in the court below. Authority for that will be found in *Jones* v. *James*. (1) There the defendant, who resided outside the jurisdiction of a particular county court, was served with a summons to appear in that court and with an order of the judge giving the plaintiff leave to issue the summons. The defendant gave notice to the registrar that he intended to rely on the Statute of Limitations. Then he applied for a prohibition on the ground that it was not clear that any plaint had been entered before

(1) 19 L. J. (Q. B.) 257, 259.

C. A. 1924

PRINGLE v. HALES.

Bankes L.J.

the judge's order was made. Erle J., in giving judgment, said: "Assuming . . . . that the order be of doubtful validity, I am of opinion that by thus coming in and pleading, the defendant has deprived himself of the power of examining minutely into the regularity of that process by which he was called upon to appear, and that as against him it must be considered as perfectly valid." In *Smythe* v. *Wiles* (1) a similar point arose. There, the defendant not having entered an appearance, the plaintiff signed judgment and then obtained a writ of inquiry to assess the damages without having obtained the leave of the court, contrary to the Sheriffs Act, 1918. The plaintiff took steps in the action by applying for particulars, appearing at the inquiry, and taking part in it after his objection to the sheriff's jurisdiction had been overruled. This Court was divided on the question whether the omission was an irregularity which could be waived or was a defect of jurisdiction which invalidated the proceedings before the sheriff. I held it to be an irregularity only, and cited a passage from Chitty's Archbold's Practice, 14th ed., p. 445, as follows: "Where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding in general is a nullity, and cannot be waived by any act of the party against whom it has been taken." And further on in my judgment there is this passage (2): "The omission therefore in the present case, and the only omission, is the failure to take out the summons, because had the summons been taken out the order must have been made." Another case of the same kind is *Shrager* v. *Basil Dighton, Ld.* (3), where a case had been wrongly assigned to an Official Referee who was not the next on the rota, and was heard by him. It was held that this hearing was not a nullity but that the

(1) [1921] 2 K. B. 66. (2) [1921] 2 K. B. 77.
(3) [1924] 1 K. B. 274.

irregularity could be waived. What is complained of in the present case is the act of the official of the West London county court in allowing process to issue from that court before leave had been obtained. In my opinion, upon the authorities I have cited, this was an irregularity which could be waived. It must therefore be taken that the action was commenced on January 30, and as the county court judge was wrong in holding that the appellant could not recover unless he recovered by judgment before that date, the case must go back to the county court in order that the amount due to the appellant may be ascertained.

ATKIN L.J. I agree. The appellant claimed to have the rent of a building apportioned. To enforce that claim he had to go to the West London county court, in the district of which the premises were situate. That is by r. 1 of the Rent (Restrictions) Rules, 1920. He also claimed under s. 14, sub-s. 1, of the Act of 1920, to recover rent which, as he said, he would be found to have overpaid when a proper apportionment was made. That claim was subject to s. 74 of the County Courts Act, 1888, and could only be brought in the court in the district of which the defendant resided or carried on his business, except by the leave of the judge or registrar. The appellant took a plaint to the West London court, and a summons was rightly issued relating to the claim for apportionment. At the same time he took to the same court the plaint relating to the claim for repayment. The defendant resided in Wandsworth so that the action could not properly have commenced in the West London court without leave. Nevertheless it was commenced in that court, because the præcipe was taken and the plaint was entered in that court, and the officer handed the plaint note to the appellant and issued the summons, all on January 30, 1924. That was the material date. It was only necessary to prove that the plaint and summons were issued on January 30, 1924, in order to establish that the action was commenced on January 30, 1924. Order v., r. 1, of the County Court Rules, 1903 to 1923, provides that all proceedings shall, except when

C. A. 1924

PRINGLE v. HALES.

Atkin L.J

otherwise provided by the Act or the Rules, be commenced by the entry of a plaint. Order VII., r. 1, provides that at the time of entering a plaint the registrar is to give to the plaintiff a note under the seal of the court giving the name of the action and the date of the trial, and a memorandum directing him to bring the plaint note with him for any purpose connected with the action. By r. 2 a summons to appear is to be dated of the day on which the plaint was entered, "and the date thereof shall be the commencement of the action." It is not quite clear whether "the date thereof" means the date of the plaint or the date of the summons, but that does not matter. The two ought to be the same, and in this case they were the same, January 30, 1924. Therefore the action commenced on January 30, 1924. But it ought not to have commenced on that day, because by s. 74 of the County Courts Act, 1888, the action for repayment ought not to have been commenced in the West London court without the leave of the judge or the registrar of that court, and no such leave had been obtained on January 30. Is that a lack of jurisdiction which makes the whole proceeding for repayment a nullity, or is it merely an irregularity which can be waived? On February 5 the appellant first applied for the necessary leave to enter the plaint in the West London court. He obtained leave, but no new summons was issued; nothing further was done; the old entry of the plaint remained dated January 30. The procedure to be followed by a judge who finds before him an action which ought not to have been commenced in his court was formerly regulated by s. 114 of the Act of 1888, which provided that he should order the action to be struck out. That section assumed that the action had been commenced, although it ought not to have been commenced. Sect. 10 of the Act of 1919 altered this and provided that "Where an action . . . . is commenced in a county court, which ought to have been commenced in some other county court, the judge may, if he thinks fit, ... instead of ordering it to be struck out . . . . proceed to hear and determine the case in the court in which it was commenced." . . . . That recognizes that though a case has been

commenced without leave against a defendant not resident or carrying on business in the district of the particular county court, nevertheless that action is to be treated as an action which has been commenced. If so, then this proceeding, although commenced without leave, is not a nullity; it is an irregular proceeding, but one with which the judge can deal if he pleases. But if the proceeding is one in which the court has jurisdiction, the irregularity may be waived; there is then no question of the parties conferring jurisdiction on a tribunal which has no authority by statute or by the common law to deal with the matter at issue between them. If the irregularity can be waived, beyond all doubt it was waived. The respondent delivered a defence, paid money into court, and appeared at the hearing; and, having two points in mind, he chose to rely on one only, because he knew the judge's view that "recoverable" in s. 8, sub-s. 2, of the Rent Restrictions Act, 1923, meant "recoverable by judgment." That view has been held to be wrong both in the Divisional Court and in this Court: see *Lewis* v. *McKay* (1); *Diment* v. *Roberts* (2); and there must be a new trial to ascertain the amount really due to the appellant.

SARGANT L.J. This is a difficult case. If I had to decide it upon the materials before the Divisional Court I should be in favour of the decision of that Court, and if my brethren had differed in opinion I should have desired further time for consideration. But in view of *Smythe* v. *Wiles* (3) and *Shrager* v. *Basil Dighton, Ld.* (4), of the narrow line which separates those irregularities which can be waived from those which cannot, and of the opinion expressed by the other members of the Court that the irregularity in this case is one which can be waived, I do not differ from their conclusion that it did not nullify the proceedings in the county court. I regret the conclusion, because by a plainly irregular act on the part of an official in the county court in giving to the summons, which could not properly have been issued

(1) [1924] 2 K. B. 136.
(2) Ante, p. 9.
(3) [1921] 2 K. B. 66.
(4) [1924] 1 K. B. 274.

C. A. 1924

PRINGLE v. HALES.

before February 5, the semblance of having been issued on January 30, the respondent has become liable to pay a considerable sum from payment of which he had by the operation of time been relieved.

Appeal allowed.

Solicitors for appellant: *Nimmo & Harvey.*
Solicitor for respondent: *Gerard Paxon.*

W. H. G.

1924
Dec. 12.

SALTER *v.* LASK.

LASK *v.* COHEN.

Landlord and Tenant—Statutory Tenant — Husband of deceased statutory Tenant dying intestate—"Member of the tenant's family"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).

Where a woman statutory tenant dies intestate her husband is a "member of the tenant's family" within the meaning of s. 12, sub-s. 1 (*g*), of the Increase of Rent, &c. (Restrictions), Act, 1920, and if residing with her at the time of her death, may become by agreement, or the decision of the county court, the statutory tenant. As statutory tenant he has such an interest in the premises as to entitle him to maintain an action of ejectment against a sub-tenant.

APPEALS from the Whitechapel County Court, which were heard together. In the case of *Salter* v. *Lask* the plaintiff, Mr. Adolph Salter, was the landlord of premises, 3 and 5 Bell Lane, Spitalfields, with a warehouse at the back, and Mrs. Fanny Lask was the tenant of the premises and warehouse. Her contractual tenancy came to an end at some time previous to her death, and at all material times she was the statutory tenant of the premises. She died intestate in September, 1922, and Mr. Jacob Cohen Lask, her husband, the defendant, who with their child, a girl of nine years of age, was residing with her at the time of her death, took out letters of administration. The plaintiff issued a summons in the county court for possession against the defendant. The defendant contended that he was entitled to retain possession, first, on the

ground that he was the administrator of the statutory tenant, and was therefore the statutory tenant, and, secondly, that he was the tenant as a "member of the . . . . family" of the deceased within the meaning of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), which enacts that "the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court." The county court judge found in favour of the defendant, and the plaintiff appealed.

In the case of *Lask* v. *Cohen* Mrs. Lask above mentioned, during the continuance of her contractual tenancy, let the said warehouse to the defendant, Mr. Samuel Cohen. When Mrs. Lask became statutory tenant of the premises she gave the defendant notice to quit, and on his refusing to do so commenced an action of ejectment against him, but died before the hearing as stated above. Her husband, the plaintiff, continued the action, and the county court judge decided in his favour that he was entitled to maintain the action. The defendant appealed.

Blanco White for the appellants. The defendant in *Salter* v. *Lask* was not entitled to possession as a statutory tenant in his capacity of administrator. The principle of *Keeves* v. *Dean* (1) is applicable. It was there held that the right of the statutory tenant is merely a personal right and cannot be assigned. There is no difference between a voluntary assignment and an assignment by operation of law on death. Sect. 12, sub-s. 1 (*f*), of the Act of 1920, which enacts that "The expression . . . . 'tenant' . . . . includes any person from time to time deriving title under the original landlord . . . ." must be read, in the light of *Keeves* v. *Dean* (1), "deriving title during the tenancy under the original landlord."

(1) [1924] 1 K. B. 685.

1924

SALTER v. LASK. LASK v. COHEN.

Secondly, the defendant, the husband, is not a member of his wife's family. In Stroud's Judicial Dictionary, 2nd ed., vol. ii., p. 694, it is stated: "The primary legal meaning of 'family' is not equivalent to familia or famille, but means 'children.'" Normally, on the death of a woman, her husband succeeds to her property, therefore one would have expected, if it was intended that he should be included in the family, that the Act would have named him.

Quass for the respondents. In *Salter* v. *Lask* the defendant was a member of his wife's family. The word is intended to have its popular meaning, and a husband is clearly a member of his wife's family in the popular sense.

In *Lask* v. *Cohen*, if the plaintiff is statutory tenant he must have the right to sue for possession, for otherwise he could not sue for rent or for anything, and would have no remedy if the sub-tenant refused to pay rent.

[On the question of the respondent's rights as administrator he was stopped.]

Blanco White replied.

SALTER J. I will deal first with the case of *Salter* v. *Lask*. The essential facts of that case are, that Salter, the plaintiff, was the landlord and Mrs. Lask the tenant of a dwelling-house which was subject to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Mrs. Lask was at all material times a statutory tenant, and her rights were those given to statutory tenants. I use the expressions "statutory tenant" and "statutory tenancy" although they are obviously inaccurate, but they are expressions which are now in general use. Mrs. Lask died intestate, and letters of administration were taken out by her husband, the defendant. The plaintiff then sued the defendant, the administrator, for possession of the dwelling-house; the defendant resisted and claimed to succeed on two grounds. The first was that he was the administrator to the deceased tenant, and that ground was approved by the county court judge. If it were necessary to review his decision a question of considerable importance would have to be considered, and

one of some difficulty in view of the decision of the Court of Appeal in *Keeves* v. *Dean*. (1) But in our view it is not necessary to determine that matter, because the county court judge's judgment can be supported on the second ground. This was that the defendant was a member of his wife's family within the meaning of s. 12, sub-s. 1 (*g*), of the Act of 1920, which enacts that "the expression 'tenant' includes . . . . where a tenant dying intestate . . . . is a woman, such member of the tenant's family [residing with her at the time of her death] as may be decided in default of agreement by the county court." That gives power to the members of the family of the deceased to decide among themselves who shall become the statutory tenant, and if they fail to agree then there is power in the county court to make a selection. In this case, at the time she died, Mrs. Lask was living on the premises with her husband and a child nine years old, and the question is whether the husband comes within the words of s. 12, sub-s. 1 (*g*), of the Act of 1920, "such member of the tenant's family." In my opinion he does. It may have to be determined some day what limit is to be put on these words "tenant's family," whether they are equivalent to "household" or whether they are limited as meaning blood relations, and in either case what members of the class respectively are indicated. But I am quite satisfied that the husband of a deceased statutory tenant is a member of that tenant's family. Of course, it is also necessary that the husband should have been residing with the tenant at the time of her death, and the defendant in this case was so residing. With regard to the words "in default of agreement" in the sub-section, there could not be a disagreement in this case in view of the fact that the only members of the family in question are father and child. Therefore I think that the county court judge's judgment was quite right.

The facts in *Lask* v. *Cohen* were as follows. Mrs. Lask, as contractual tenant, let a part of the premises to Mr. Cohen, the defendant. Mrs. Lask then became statutory tenant,

(1) [1924] 1 K. B. 685.

1924

SALTER v. LASK LASK v. COHEN.

Salter J.

and as such tenant gave Cohen notice to quit, and Cohen held over. Mrs. Lask commenced an action for possession against Cohen, but died soon afterwards. Letters of administration were taken out by her husband, the plaintiff, and he proceeded with the action. The question was whether he had such an interest in the premises as entitled him to maintain the action, and the county court judge decided that the plaintiff, having become the statutory tenant by reason of the taking out of letters of administration, had such a title. His judgment can be supported, as I have said, on the provisions of s. 12, sub-s. 1 (*g*), of the Act of 1920, and it is not, therefore, necessary to consider the point decided by the county court judge. Both appeals will be dismissed.

MACKINNON J. I agree. There are two questions: first, whether an administrator can resist ejectment. On consideration of *Keeves* v. *Dean* (1) I think that the answer is that he cannot; but it is not necessary to give a definite answer to that question, because of the answer we give to the second question, which is, whether the husband is a tenant by reason of the provisions of s. 12, sub-s. 1 (*g*), of the Act of 1920. I think that he is clearly a member of the family of his deceased wife. Mr. White for the appellants in both cases asked us to say that he was not; but supposing a wife were asked whether any one was living with her except her family, one would hardly expect her to answer: "Yes, besides my family there is my husband." The language used in this Act resembles that of popular journalism rather than the terms of the art of conveyancing.

I agree that the appeals be dismissed.

Appeals dismissed.

Solicitors for appellants: *E. B. Gee & Co.*
Solicitor for respondents: *F. J. Rutledge.*

(1) [1924] 1 K. B. 685.

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1925
Jan. 16, 19.

SPENCER *v.* ASHWORTH PARTINGTON AND COMPANY.

[1923. S. 8399.]

Company—Sale of Shares—Blank Transfer—Liability of Purchaser to Indemnify Vendor against Calls—Extent of.

Where the owner of shares in a company sells them there arises out of the contract of sale an implied promise by the purchaser to indemnify his vendor against all calls that may be made upon him in respect of the shares at any future date, whether made while the purchaser remains entitled to the shares or after he has parted with them to a sub-purchaser; and it makes no difference in that respect that the transfer which the vendor delivers to the purchaser in completion of his contract is executed in blank.

Humble v. *Langston* (1841) 7 M. & W. 517 overruled.

Appeal from a judgment of Acton J. at the Manchester Assizes.

The plaintiff and the defendants were both stockbrokers. On September 6, 1921, the plaintiff sold to the defendants 200 shares in the Pilot Spinning Company. To complete that contract he bought 200 shares in the company from Mr. and Mrs. Marland, and on September 15 forwarded a transfer of the shares in blank to the defendants. The defendants had bought the shares as brokers for a Mr. Buckley Henthorne, to whom they passed on the transfer. After the blank transfer had been so parted with to Henthorne calls were made upon the shares. As Henthorne had neglected to get himself put upon the register of the company the Marlands, who remained on the register as the owners of the shares, had to pay the calls. In the meantime Henthorne had got into difficulties and became bankrupt. Mr. and Mrs. Marland then commenced an action against the plaintiff, claiming an indemnity from him against the liability on the calls, and he in turn brought this action against the defendants for an indemnity by them. The action was tried before Acton J. at the Manchester Spring Assizes, 1924. The

C. A. 1925

SPENCER v. ASHWORTH PARTINGTON & Co.

learned judge held, on the authority of *Humble* v. *Langston* (1) and *Walker* v. *Bartlett* (2), that a purchaser who took a transfer of shares in blank was liable to indemnify the vendor only against such calls as were made whilst he, the purchaser, remained beneficially interested; and as here the calls were not made until after the defendants had passed on the transfer to Henthorne, they were under no liability to indemnify the plaintiff. He accordingly gave judgment for the defendants.

The plaintiff appealed.

Courthope Wilson K.C. and *John Bennett* for the appellant. On a sale of shares there is an implied undertaking by the purchaser to indemnify the vendor against all calls that may be made upon him in respect of the shares at any future date, whether made while the purchaser remains beneficially interested in them or after he has parted with them to a sub-purchaser. This undertaking arises out of the contract of sale and is quite independent of the form of the transfer that is given to the purchaser. In *Maxted* v. *Paine* (3) in the Exchequer Chamber Blackburn J. said that under a contract for the sale of shares, although apart from Stock Exchange usage the vendor cannot require the buyer to take a transfer in his own name, he has a right to be indemnified by the buyer against future calls, which is not affected by his transfer of the shares to a third person, for notwithstanding such a transfer "he still has the personal liability of the original contractor." (4) And in *Kellock* v. *Enthoven* (5) the same judge said, "Even if *Roberts* v. *Crowe* (6) did not decide the matter, I think it is clear upon the authority of *Walker* v. *Bartlett* (2), and also upon general principles, that when there was the contract to purchase the shares from the vendor, there was also an implied contract that the vendee would hold the vendor harmless from all the burdens of the property which he had taken from the vendor. The transferee, who is the

(1) 7 M. & W. 517.
(2) (1856) 18 C. B. 845.
(3) (1871) L. R. 6 Ex. 132.
(4) Ibid. 156.
(5) (1873) L. R. 8 Q. B. 458; at p. 464.
(6) (1872) L. R. 7 C. P. 629.

purchaser of the property, was to get all the benefits as long as the possession of the property was beneficial; and I think the law implies from that, that the purchaser contracts to indemnify the transferor against all the burdens of the property which he, the transferee, has taken. That being so, I do not think that that liability is got rid of by the purchaser passing over the property to another, who would enter into a similar contract of indemnity as between him and his immediate vendor." In that case the rule was held to apply even where the sub-transferee had been placed on the register, but, by reason of the company being wound up and the sub-transferee being unable to pay, the original vendor was placed on the B list of contributories. That decision was affirmed in the Exchequer Chamber. (1) The case relied on by the judge below, *Humble* v. *Langston* (2), no doubt decided that even as between a vendor of shares and his immediate purchaser, there was no implied contract at law to indemnify the vendor at all. That was, however, dissented from by the Exchequer Chamber in *Walker* v. *Bartlett* (3), to the extent of holding that there was an implied obligation to indemnify, at all events, against calls made before the purchaser had resold the shares. The Court there left open the question whether the indemnity extended to calls made after the purchaser had ceased to be the owner. But that was definitely disposed of by *Kellock* v. *Enthoven* (4), the decision in which case is quite inconsistent with any other view than that the implied contract of indemnity applies to all calls made subsequently to the purchase by the defendant, whether made before or after he has resold them.

Eastham K.C. and *E. Talbot* for the respondents. It may be conceded that where the vendor of shares fills in the transfer with the name of the purchaser, thereby indicating that the purchaser is to get his own name registered, and no one else's, there is an implied contract by the purchaser to indemnify the vendor against any calls made before

(1) (1874) L. R. 9 Q. B. 241.
(2) 7 M. & W. 517.
(3) 18 C. B. 845.
(4) L. R. 8 Q. B. 458; L. R. 9 Q. B. 241.

C. A. 1925

SPENCER v. ASHWORTH PARTINGTON & Co.

registration. But it is otherwise where the transfer is in blank. In such a case it is said in Palmer's Company Precedents, 12th ed. pt. 1, p. 642, that "As between transferor and transferee, there is an implied contract by the latter to indemnify the former against all liability in respect of the shares during the time that the transferee holds them." For that proposition *Loring* v. *Davies* (1); *Levi* v. *Ayers* (2); and *Hardoon* v. *Belilios* (3) are cited, and those cases seem to show that the obligation of indemnity arises only out of the relation of trustee and cestui que trust, the vendor, as registered owner, holding the shares as trustee for the persons for the time being beneficially entitled, and the obligation ceasing as soon as that relationship has come to an end by reason of the purchaser parting with his interest in the shares.

BANKES L.J. This is an appeal from a judgment of Acton J., which raises a very important point. As the case was tried on circuit there was not the same opportunity of looking closely into the authorities at the trial as on the hearing of the appeal before us. The question for decision is this: Where the holder of shares sells them and delivers to the purchaser a transfer in blank, is the purchaser liable to indemnify the vendor against calls made on the shares after the purchaser has resold them and passed on the transfer to the sub-purchaser, or is he only liable to indemnify him against calls made whilst he, the purchaser, was beneficially interested in the shares? The learned judge adopted the latter view, and he did so upon the authority of *Humble* v. *Langston* (4), which was decided by the Court of Exchequer in the year 1841.

A broad distinction is to be drawn between the case of a vendor who, having transferred the shares in blank, sues his immediate transferee upon the contract, and that of a vendor suing a sub-transferee who, by reason of the absence of any contractual relation, can only be liable on equitable principles. In the latter case the vendor, having delivered a blank transfer,

(1) (1886) 32 Ch. D. 625.
(2) (1878) 3 App. Cas. 852.
(3) [1901] A. C. 118.
(4) 7 M. & W. 517.

so long as his name remains on the register is trustee for the person for the time being entitled to the equitable interest in the shares, with the consequence that that person is bound to indemnify him against calls made while he is so entitled. That obligation of indemnity only covers the period during which the relationship of trustee and cestui que trust exists, and, therefore, if the person sued has, before the calls were made, transferred the shares to another and so ceased to occupy the position of cestui que trust, he cannot be called upon to indemnify the vendor. But the present action is not brought against a sub-transferee, but against the immediate purchaser from the vendor, and the contention of the plaintiff is that out of that contract of sale the law will imply a promise to indemnify the vendor against any future calls, whenever made, which the vendor may be compelled to pay. Mr. Eastham contends that even as between the vendor and his immediate transferee, where he takes under a blank transfer, the transferee's obligation of indemnity is limited to calls made while he was beneficially interested, and it may be conceded that if *Humble* v. *Langston* (1) is good law there is undoubted support in that case for his contention; for Parke B., delivering the judgment of the Court, there said that if the plaintiff did not take the trouble to insist on the transfer being made out in the name of the purchaser, in which case if the purchaser neglected to get himself registered and calls were made on the shares the plaintiff would have had an action for damages, or if he neglected to insert a stipulation in the contract of sale that if the transfer was executed in blank the vendee should be subject from the date of it to the conditions on which the vendor held the shares, he was without remedy in a court of law, for he was of opinion that there was no implied contract by a purchaser of shares who takes a blank transfer to indemnify the vendor against calls at all, his only remedy being in equity, and for the reason above mentioned. "The plaintiff," he said (2), "might have insisted that he would not deliver such a blank conveyance as was asked, which might postpone indefinitely

(1) 7 M. & W. 529, 530. (2) 7 M. & W. 517.

C. A. 1925

SPENCER v. ASHWORTH PARTINGTON & Co.

Bankes L.J.

the actual conveyance to a vendee, unless the defendant would indemnify him against all intermediate calls; and if that had been done the plaintiff would have been safe; but this he omitted, and there is no trace of any evidence of such a contract having been made or contemplated." Parke B. was there speaking of the state of things in 1841, but I do not think that anybody familiar with the course of business at the present day would say that a vendor of shares who executes a transfer in blank does not contemplate being indemnified. Then he goes on, "Does the law raise any such contract? We think it does not. The plaintiff, by his neglect to get the conveyance completed and the transfer entered, becomes a trustee for the defendant and his assigns, and receives the profits, and must pay the outgoings; but there is no authority for saying that the law makes any promise by a cestui que trust to a trustee, simply to repay all that the trustee may pay on his own account, still less on that of the subsequent cestui que trust." He there denied that any promise of indemnity enforceable in a court of law was to be implied, either from the relationship of vendor and purchaser or from that of trustee and cestui que trust, and suggested that the only remedy was in equity, with the consequent limitation above referred to. This was the view taken of that decision by Willes J. in the later case of *Walker* v. *Bartlett* (1), where in the course of argument he said: "*Humble* v. *Langston* (2) is recognised by Wigram V.-C. in *Phené* v. *Gillan* (3), which seems to show that there may be a remedy in equity, though none be enforceable in a court of law." In *Walker* v. *Bartlett* (1) the Court of Common Pleas felt themselves bound to follow the decision in *Humble* v. *Langston* (2), but they did so with evident reluctance. On that case being brought before the Exchequer Chamber Wightman J., delivering the judgment of the Court (4), laid down the law in terms which were quite inconsistent with *Humble* v. *Langston*. (2) "It could hardly," he said, "have been the intention of the parties that, if the defendant for his

(1) (1856) 17 C. B. 446, 453.
(2) 7 M. & W. 517.
(3) (1845) 5 Hare, 1.
(4) 18 C. B. 845, 863.

own benefit omitted to make a perfect transfer by registration in the company's books, the plaintiff should still continue to pay the calls; and if that was not their intention, was it not understood between them that the defendant should save the plaintiff harmless from any calls made during the time when he was virtually owner of the shares?" It is true that that statement suggests that the obligation to indemnify is limited to the time during which the defendant was the owner of the shares; but it is a distinct expression of opinion that at all events to that extent there was arising out of the contract of sale an implied promise of indemnity. When we come to the case of *Maxted* v. *Paine* (1) it seems to me, and I think is admitted by Mr. Eastham, that if what Blackburn J. there said is correct, *Humble* v. *Langston* (2) can no longer be regarded as law. After saying that "the Court of Exchequer decided that there was no contract at law to indemnify him" (the plaintiff), "his only remedy being in equity," the learned judge went on to read the passage from Parke B.'s judgment which I have already quoted, and added: "This latter part of the judgment"—that is the part denying the existence of any implied contract of indemnity—"was reversed in the Exchequer Chamber in the case of *Walker* v. *Bartlett*" (3), and he concluded by saying that though the Exchequer Chamber decided that a contract for the sale of shares simpliciter was a contract "to execute and deliver to the defendant a transfer generally, not a transfer to the defendant himself," the obligation of indemnity existed equally whichever form of transfer was adopted, "for it is obvious that so long as the supplier of the shares has the personal liability of his contractor, who is bound to see that by the registering of the transfer the burden of the ownership is removed from him, it is immaterial to him whether that object is to be obtained by registering one name or another. If it is done he is free, if it fails he still has the personal liability of the original contractor." That is a definite statement by the learned

(1) L. R. 6 Ex. 132. (2) 7 M. & W. 517.
(3) 18 C. B. 845.

C. A. 1925

SPENCER v. ASHWORTH PARTINGTON & CO.

Bankes L.J.

judge that there is an obligation on the original transferee to indemnify his transferor arising out of the contract, none the less where the transfer is in blank. It seems to me to be obvious that that view is the right one, and that there is no reason for suggesting that as between the contracting parties there should be superimposed upon that obligation the limitation which arises out of the peculiar relationship of trustee and cestui que trust. For these reasons I think the judgment appealed from must be set aside.

SCRUTTON L.J. I am of the same opinion. It is fair to the learned judge below, from whose judgment we are differing, to say that the case was heard on circuit where there are not great facilities for consulting the authorities, and he did not have the advantage, which we have had, of all the relevant decisions on the subject being cited before him.

The owner of shares in a cotton mill, on which there was a heavy liability to calls, sold them and gave the purchaser a transfer in blank. The purchaser resold them to a third person to whom he handed over the blank transfer. The third person did not register the transfer, and, calls having been made in the meantime, became bankrupt. Thereupon the original vendor, on whom the calls were made, sued his immediate purchaser for an indemnity against those calls. The learned judge, following the judgment of Parke B. in *Humble* v. *Langston* (1), held that no contract of indemnity was to be implied, particularly as at the time when the calls were made the defendant was not the beneficial owner of the shares. Now when once a transfer is registered, except in the case of a winding-up where the transferor is placed on the B list of contributories, the registration frees the vendor from liability for calls, and leaves the new registered owner alone liable. If the transfer is not registered the transferee and sub-transferees are in turn owners in equity of the shares, and the question then arises, What is their position? The law on that subject is thus laid down in Fry on Specific Performance, 6th ed., § 1497. "The vendor . . . . will be

(1) 7 M. & W. 517.

entitled to a direction that the defendant execute a proper deed of transfer and concur in all steps necessary to procure its registration, and also, in the case of the vendor being plaintiff, to a declaration of his right to indemnity in respect of calls on the shares accruing after the purchaser has become the owner in equity." Where the purchaser has become owner at law by registration the vendor does not want such a declaration, for he is no longer under any liability. The implied contract appears to me to rest ultimately on the principle that one who takes the benefit must take also the burden. Another ground upon which it may be rested is that suggested by Willes J. in *Roberts* v. *Crowe* (1), "Where two persons are equally liable for a debt, and the person who is not in the enjoyment of the property in respect of which the debt arises, and, therefore, only secondarily liable, is called upon to pay, he shall have an indemnity from the other." If there is no contractual relation between the plaintiff and the person from whom the indemnity is sought, the obligation to indemnify cannot be rested on implied contract; in that case it can only arise from the relation of trustee and cestui que trust. As was said by Sir Barnes Peacock in *Levi* v. *Ayers* (2) the right to indemnity "must be founded upon these two propositions, or one of them—viz., (1.) That the transferee of shares in a company formed under the Companies Act, 1862, who takes the beneficial ownership, is bound to indemnify the transferor against all liabilities in respect of them subsequent to the date of the transfer; (2.) That a trustee whose name is on the register, though personally liable as a shareholder, is entitled to be indemnified by his cestui que trust." In the absence of privity of contract it is essential that the defendant should have had a beneficial interest at the date of the call. *Humble* v. *Langston* (3), on the authority of which the judge below relied, no doubt decided directly that where a vendor tenders and the purchaser accepts a blank transfer, no contract to indemnify the vendor is to be implied. But

(1) L. R. 7 C. P. 629, 636. (2) (1878) 3 App. Cas. 842, 852.
(3) 7 M. & W. 517.

C. A. 1925

SPENCER v. ASHWORTH PARTINGTON & CO.

Scrutton L.J.

when fifteen years later that question was again brought before the Courts, the Exchequer Chamber in *Walker* v. *Bartlett* (1) decided the other way, and both Blackburn J. in *Maxted* v. *Paine* (2) and Fry L.J. in his book on Specific Performance, 6th ed., p. 679 n., treat *Humble* v. *Langston* (3) as overruled by that case. It is true that the Court in *Walker* v. *Bartlett* (1) did not in terms say that the earlier decision was wrong, they preferred to distinguish it upon the ground that there the plaintiff claimed to be indemnified against all future calls, even though made after the defendant had himself transferred the shares to other persons, whereas in the case before them he only claimed an indemnity against calls made when the defendant was beneficially interested in the shares. That distinction was drawn no doubt out of respect for Lord Wensleydale, under the shadow of whose great reputation as Parke B. the Courts were then living. (3) Moreover the question whether the indemnity was limited to calls made before the defendant had passed on the beneficial interest was not before the Court in *Walker* v. *Bartlett*. (1) It was before the Court in *Kellock* v. *Enthoven* (4), where the plaintiff having sold certain shares to the defendant, and the defendant having transferred them to a sub-purchaser, the calls in respect of which indemnity was sought were made not merely after the transfer to the sub-purchaser but after that sub-purchaser had become registered as a shareholder. The liability of the plaintiff to pay the calls there arose from the fact that the company was being wound up, and the sub-purchaser, who was on the A list of contributories, having defaulted, the plaintiff was placed upon the B list under s. 38 of the Companies Act, 1862. It was held by the Queen's Bench that the plaintiff was entitled to an indemnity. Blackburn J. said: "I think the law implies . . . . that the purchaser contracts to indemnify the transferor against

(1) 18 C. B. 845.

(2) L. R. 6 Ex. 132.

(3) Parke B. was created Lord Wensleydale on January 5, 1856; *Walker* v. *Bartlett* was decided on June 24 of that year.

(4) L. R. 8 Q. B. 458, 464, 466; L. R. 9 Q. B. 241.

all the burdens of the property which he, the transferee, has taken. That being so, I do not think that that liability is got rid of by the purchaser passing over the property to another," and Quain J., after stating the defendant's contention that "the liability is to be limited to the time during which the transferee is the actual possessor of the shares, and ceases when he transfers them," said, "There is nothing in the cases, or in the language of s. 38, or the nature of things, which goes so to limit the liability." But if the defendant in that case, who actually procured his sub-purchaser to be registered, had no answer to the plaintiff's claim, it is difficult to see how the defendant in the present case who, having resold, passed on a blank transfer, could be in any better position. It seems to me that as between a vendor of shares and his immediate purchaser the obligation of indemnity is wholly independent of the form of the transfer by which the contract of sale is performed. I agree that the appeal should be allowed.

ATKIN L.J. But for the decision of the Court of Exchequer in 1841, which was the foundation of the judgment now appealed from, I should have thought that this was a very simple case. The position is this. The plaintiff is a stockbroker carrying on business at Blackpool, and he sold 200 shares in a cotton mill company to the defendants, who are stockbrokers at Manchester. The shares were 5*l.* shares, 1*l.* paid, and the price paid for them by the defendants was 1*s.* 10½*d.* per share, which showed plainly that the parties knew there was a likelihood of a call being made on the shares. The plaintiff, in order to satisfy his contract with the defendants, bought the required number of shares from a Mr. and Mrs. Marland, from whom he received a transfer executed in blank, and he passed on that transfer to the defendants. The defendants then resold the shares to a man named Henthorne, and passed on the blank transfer to their purchaser. Henthorne did not register the shares in his name and eventually became bankrupt. Calls having been made on the shares subsequently to the resale to

C. A. 1925

SPENCER v. ASHWORTH PARTINGTON & Co.

Atkin L. J.

Henthorne, Mr. and Mrs. Marland, as the registered owners of the shares, had to pay them, and brought their action against the plaintiff to recover the amount so paid. The plaintiff, admitting liability to indemnify his vendors, allowed judgment to go by default, and then commenced the present action for an indemnity against the defendants. Now it seems to me to be a plain principle that, under a contract for the sale and purchase of shares which have a liability on them, the purchaser impliedly agrees with the vendor that he will indemnify him against all future liability on the shares, and that implied agreement continues in force until, if at all, it is discharged by novation, that is to say until the vendor agrees to accept the liability of the sub-purchaser, as the person to whom, by way of completion of the transaction, he is going to transfer the shares, in lieu of that of his immediate purchaser. The only authority against that proposition is *Humble* v. *Langston*. (1) That was a case very similar to the present. There, as here, there was a sale of shares with a liability on them, and the performance of the contract was by a delivery of a transfer in blank. Parke B., who delivered the judgment of the Court, came to the conclusion that under a contract so performed there was no implied promise of indemnity at all. His reasoning seems to have been this: If the contract were executed in the way in which he thought it ought to have been executed, by a transfer into the purchaser's name, a duty would lie on the purchaser to see that the transfer was duly registered; if that were done the vendor would cease to be under any liability for calls, and if it were not done an action for damages for breach of his contract would lie against the purchaser in respect of any calls which the vendor became improperly liable to pay. If however the contract of sale is performed by the delivery of a blank transfer, inasmuch as the proper inference from that is that the parties do not intend that the purchaser shall register his own name, but that he shall pass on the transfer to somebody else, the obligation which alone will support the claim for damages—namely, the obligation

(1) 7 M. & W. 517.

to procure registration, disappears, and consequently the right to recover damages fails. It seems to me that that is wrong and for two reasons: In the first place it assumes that there is an obligation on the purchaser to procure himself to be registered, whereas in my opinion Blackburn J. was right in saying (1) that the obligation is only to procure himself or some other satisfactory person to be registered; and, secondly, it is wrong in ignoring the initial obligation of indemnity created by the agreement for sale, and in imputing to a blank transfer an effect which would destroy that obligation. However the foundation of that case is entirely destroyed by *Walker* v. *Bartlett* (2), for there the Exchequer Chamber held distinctly that on a sale and purchase of shares there was an implied contract of indemnity. It is true that they limited the indemnity to liability for calls made on the vendor while the purchaser was still the beneficial owner of the shares, but they negatived what was the foundation of *Humble* v. *Langston* (3)—namely, that there was no implied contract of indemnity at all. That limitation so put on the indemnity in *Walker* v. *Bartlett* (2) was wholly unnecessary to the decision of that case, for there the defendant had not parted with the shares, and no question arose as to what the legal position would be if he had, and it was finally got rid of by *Kellock* v. *Enthoven*. (4) There the plaintiff, a shareholder, sold his shares to the defendant, who resold them to a third person, and that third person was registered as the holder. The company was wound up and the new holder was placed on the A list of contributories, but as he was unable to pay the calls the plaintiff, as having held the shares within the preceding twelve months, was placed on the B list, and compelled to pay. It was held that he was entitled to an indemnity from the defendant, although at the time the calls were made the defendant had ceased to have any beneficial interest in the shares. With that decision the last vestige

(1) L. R. 6 Ex. 155.
(2) 18 C. B. 845.
(3) 7 M. & W. 517.
(4) L. R. 8 Q. B. 458; L. R. 9 Q. B. 241.

C. A. 1925

SPENCER v. ASHWORTH PARTINGTON & Co.

Atkin L.J.

of the authority of *Humble* v. *Langston* (1) disappears. The result is that, as I have already said, on an agreement for the sale and purchase of shares there is an implied undertaking by the purchaser to indemnify the vendor against all subsequent liability on the shares, except in the case of a novation. Subject to that the right of indemnity exists. For that purpose it seems to me that the fact of the transfer being in blank is perfectly immaterial. The obligation to indemnify arises from the actual contract of sale, and not from the particular mode of its performance; and it would be strange if the vendor, having by the contract acquired a complete right of indemnity, should lose it because he completes it in one manner rather than another, and especially as a transfer in blank is executed in that form for the convenience of the purchaser and not for that of the vendor. For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellant: *Megson & Nicholson, Oldham.*

Solicitors for the respondents: *Jaques & Co., for Armstrong & Taylor, Oldham.*

(1) 7 M. & W. 517.

J. F. C.

THE KING *v.* FRANK SMITH.

C. C. A.
1925
Feb. 10.

Criminal Law—Recognisance—Alleged Breach—Conviction—Sentence—Right of Appeal—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

An appeal lies to the Court of Criminal Appeal against a sentence passed on an alleged breach of a recognisance to be of good behaviour for a certain time, on the ground that the appellant has not broken the recognisance.

Doubt in *Rex* v. *Callaghan* (1913) 8 Cr. App. R. 185 settled.

Breach of recognisance must be proved like any other fact alleged in a criminal court.

APPEAL against sentence.

On October 14, 1924, at East Sussex quarter sessions, the defendant was convicted on his own confession of stealing a motor car, but under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), was discharged conditionally on his entering into a recognisance of 50*l.* to be of good behaviour for two years.

On January 6, 1925, at that court, the defendant was brought up for sentence on an allegation that he had broken his recognisance. At the trial a witness for the prosecution, in whose employment the defendant had been, alleged that the defendant had been untruthful and addicted to drink, that during November, 1924, he had taken out a motor car without permission, stolen a ring and concealed it in a child's perambulator where it was afterwards found, and stolen other things also; but the defendant was not given an opportunity of cross-examining that witness or of giving or bringing evidence to the contrary. A police witness was then called who stated that on December 1, 1924, at petty sessions, the defendant had been convicted of stealing a lantern and a rug on some date which was not specified in September or October, 1924, and had been sentenced to one day's imprisonment. The defendant, on being asked by the chairman why he had not reported himself, pointed out that his recognisance did not require him to report himself. The court of quarter sessions, after referring to the conviction of the defendant at petty sessions, found that the defendant had broken his

C. C. A. 1925

REX v. FRANK SMITH.

recognisance and sentenced him to eighteen months' imprisonment with hard labour.

The defendant appealed by leave against that sentence on the ground that he had not broken his recognisance.

Reginald Blaker, for the defendant, appellant. The court of quarter sessions wrongly sentenced the defendant on breach of his recognisance. No breach of his recognisance was proved. As to the allegations of a witness for the prosecution that the defendant was guilty of drunkenness, and of the theft of a rug and other articles, the defendant was never charged with any of these alleged offences, and he was not asked to give or to bring evidence to the contrary. As to the evidence that the defendant had been convicted of theft at petty sessions, it did not appear that the offence was committed during his period of probation. The court of quarter sessions would seem to have thought that the defendant committed a breach of his recognisance in not having reported himself, though his recognisance did not require him to report himself. The sentence should be quashed.

R. A. Powell for the prosecution. The sentence was right. It was proved that the defendant broke his recognisance. The recognisance bound him to be of good behaviour for two years. In order to justify a sentence on a breach of a recognisance such as that, it is sufficient to show that at some time during the period of probation the defendant has not been of good behaviour, without necessarily proving that he has been convicted of any offence. Here it appeared from the evidence of the defendant's former employer, which was entirely uncontradicted, that the defendant had not been continuously of good behaviour since being put on probation. The defendant was not sentenced on the ground that he had failed to comply with a supposed condition in the recognisance that he should report himself.

The judgment of the Court (LORD HEWART C.J., SALTER and FRASER JJ.) was delivered by

SALTER J. In this case the defendant was convicted on his own confession on October 14, 1924, of stealing a motor

C. C. A. 1925

REX v. FRANK SMITH.

car and was released on his own recognisance to be of good behaviour for two years. On January 6, 1925, he was brought up before the court of quarter sessions on an allegation that he had broken his recognisance, and on the footing that he had done so he was sentenced to eighteen months' imprisonment with hard labour. He now appeals by leave against that sentence on the ground that it was not proved that he had broken his recognisance.

The first question that arises is whether in such a case as this an appeal lies to this Court. The Criminal Appeal Act, 1907, s. 3, provides: "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—(*a*) against his conviction on any ground of appeal which involves a question of law alone; and (*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal; and (*c*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law." In the case of *Rex* v. *Callaghan* (1), where the defendant was convicted and sentenced on breach of a recognisance and appealed against his sentence, the Court of Criminal Appeal held that under that section an appeal lay to the Court against the quantum of the sentence, but reserved its opinion on the question whether an appeal lay against the determination of the question whether or not the recognisance has been broken. In the opinion of this Court there is no reason for holding that an appeal does not lie to the Court against a decision that the defendant has broken his recognisance. Where the defendant appeals against his sentence on the ground that he has not broken his recognisance, he is entitled to appeal to this Court, by leave of this Court, against the whole of his sentence.

The next question is whether it was duly proved before the court of quarter sessions that the defendant had broken

(1) 8 Cr. App. R. 185.

C. C. A. 1925

REX v. FRANK SMITH.

his recognisance by failing to be of good behaviour for two years from October 14, 1924. Where a defendant is brought up on an allegation that he has broken his recognisance, he cannot properly be sentenced unless that allegation of fact is proved, and it must be proved as any other allegation of fact is proved in a criminal court. It must be supported by the sworn evidence of witnesses for the prosecution, and the defendant must be allowed to cross-examine these witnesses, and also to give evidence himself and to call witnesses to give evidence on his behalf. In this case the defendant was not given an adequate opportunity of exercising these rights. A police witness stated that the defendant had been convicted at petty sessions of stealing a rug and a child's magic lantern, but it did not appear whether that offence had been committed during the defendant's period of probation, and it cannot be supposed that the court of quarter sessions regarded that evidence as sufficient to prove a breach of the recognisance. Another witness suggested that the defendant during his period of probation had stolen a ring which was afterwards found in a child's perambulator, but the defendant was not asked to cross-examine that witness or to give or call evidence in regard to the matter. The defendant was asked by the Court why he had not reported himself, but his recognisance did not require him to report himself, and he had never been told to do so. There was no evidence before the Court that the defendant had broken his recognisance. The sentence must therefore be quashed.

Appeal allowed. Sentence quashed.

Solicitor for defendant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *The Director of Public Prosecutions.*

J. R.

[IN THE COURT OF APPEAL.]

C. A.
1924
Dec. 19.

KAYLEY *v.* HOTHERSALL AND OTHERS.

[1924. K. 307.]

Execution—Practice—Judgment Debt—Payment by Surety—Assignment of Judgment to Surety by judgment Creditor—Leave to issue Execution against Co-surety—"Change of parties"—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 129—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict., c.* 97), *s.* 5—*Rules of Supreme Court, Order* XLII., *r.* 23.

Where a surety has paid a judgment debt and has obtained an assignment of the judgment under s. 5 of the Mercantile Law Amendment Act, 1856, he must obtain the leave of the Court under Order XLII., r. 23, before he can issue execution against his co-surety to enforce contribution to the judgment debt.

Dictum of Parker J. in *Dale* v. *Powell* (1911) 105 L. T. 291, 292 approved and followed.

Decision of Acton J. affirmed.

APPEAL from a decision of Acton J.

By an agreement in writing dated February 27, 1916, the defendants P. Hothersall, R. Hothersall, F. E. Mandle, J. E. Atkinson (since deceased), W. E. Fisher, and F. T. Metcalf agreed with the plaintiff J. Kayley that in consideration of the plaintiff advancing to the Palace Theatre (Radcliffe), Ld., of 66 Mosley Street in the city of Manchester a loan of 1000*l.*, the defendants P. and R. Hothersall, Mandle, Atkinson, Fisher, and Metcalf jointly and severally guaranteed the repayment by the Palace Theatre (Radcliffe), Ld., of the said sum of 1000*l.* together with interest thereon, as therein mentioned.

On April 14, 1924, the plaintiff obtained a judgment against the defendants P. and R. Hothersall, Mandle, Fisher, and Metcalf for the sum of 1076*l.* 1*s.* 11*d.* due under the agreement and against the defendants Fisher and Mandle for 12*l.* 6*s.* 6*d.* costs and against the defendants P. and R. Hothersall and Metcalf for 8*l.* 19*s.* 6*d.* costs.

The defendants Mandle and Fisher paid to the plaintiff the judgment debt of 1076*l.* 1*s.* 11*d.*, together with 5*l.* 6*s.* 7*d.* interest thereon, and 12*l.* 6*s.* 6*d.* costs.

C. A. 1924

KAYLEY v. HOTHERSALL.

By an indenture dated October 6, 1924, the plaintiff at the request of the defendants Mandle and Fisher for the consideration therein mentioned and in pursuance of s. 5 of the Mercantile Law Amendment Act, 1856, assigned to R. C. Saint the judgment and all right and benefits thereunder.

On November 2 Saint, as trustee under the deed, applied by summons in chambers for liberty to issue execution against the defendants P. and R. Hothersall upon the judgment. In opposition to the summons the defendants P. and R. Hothersall filed affidavits, in which they claimed to set off against the amounts due from them under the judgment. certain sums which they alleged were due to them from the defendants Mandle and Fisher in respect of other transactions between them, and which, as they contended, exceeded the amount due from them on the judgment. On the hearing before Master Chitty the defendants were cross-examined on their affidavits, and in the result the Master refused to make any order.

Saint appealed. The appeal was heard by Acton J. on December 5, 1924, who by his order dismissing it declared that Master Chitty was right in holding that the defendants P. and R. Hothersall's claims to set off should be taken into consideration by him in deciding whether Saint should have leave to issue execution, and further ordered that the hearing of such part of Saint's appeal as asked that the Master's order, on the basis that he had a discretion to allow the set-off asked for, be varied, should stand adjourned until after the hearing of the appeal.

Saint appealed. The appeal was heard on December 19, 1924.

C. J. Conway for the appellant. This case raises a question on the construction of s. 5 of the Mercantile Law Amendment Act, 1856. (1) The effect of the assignment of a judgment

(1) Mercantile Law Amendment Act, 1856, s. 5: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be

under that section is to put the assignee in the same position as the judgment creditor and to enable him forthwith to issue execution upon the judgment against his co-defendants to enforce contribution from each of them. The very object of the statute was to give the co-surety or co-debtor a prompt and efficacious remedy for obtaining such contribution: see per Erle C.J. in *Batchellor* v. *Lawrence*. (1) It is submitted therefore that no leave to issue execution under Order XLII., r. 23 (2), was necessary.

[SCRUTTON L.J. referred to the observations of Parker J. in *Dale* v. *Powell*. (3)]

Those observations, it is submitted, were obiter.

Rule 23 of Order XLII. (2) reproduces the provisions of s. 129 of the Common Law Procedure Act, 1852, which superseded the more cumbrous procedure by scire facias. The Mercantile

entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

(1) (1861) 9 C. B. (N. S.) 543, 550.

(2) Order XLII., r. 23: "In the following cases, viz.: (*a*) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution . . . . the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just."

(3) 105 L. T. 291, 292.

C. A. 1924

KAYLEY v. HOTHERSALL.

Law Amendment Act, 1856, was passed subsequently to that Act, and the object of s. 5 was to give the assignee of a judgment a speedy remedy freed from the restrictions imposed by s. 129 of the Act of 1852. If that be so, then it is submitted that the remedy is also freed from the restrictions imposed by r. 23 of Order XLII., which took the place of s. 129.

[He also referred to *In re Parker*. (1)]

R. P. Croom-Johnson for the respondents was not called upon to argue.

POLLOCK M.R. This is an appeal from an order of Acton J. made on December 5 last. It appears that in this action judgment was given in favour of the plaintiff for payment to him by the five defendants of a certain sum of money, and that of these five defendants the two defendants Fisher and Mandle satisfied the plaintiff's claim under the judgment. Thereupon the two defendants Fisher and Mandle asked that the interest of the plaintiff in the judgment should be assigned to one Saint in trust for them in accordance with s. 5 of the Mercantile Law Amendment Act, 1856. Accordingly an assignment of the judgment was executed by the plaintiff to Saint as trustee for Fisher and Mandle. It is right to say that F. T. Metcalf, one of the five defendants, has made good and paid his proper contribution to the sum for which the five defendants were liable.

The application now made by Saint, the trustee, is that he should be entitled to put in an execution against the two defendants P. and R. Hothersall who did not make good, and who have not paid. Before the application for leave to issue execution was made, the Practice Master expressed an opinion that leave must be obtained to issue such execution in accordance with Order XLII., r. 23, on the ground that, on the facts which I have stated, there had been a change by death or otherwise in the parties entitled to the issue of execution. Thereupon an application was made to Master Chitty, and before him the point was taken that there was really no necessity to ask for leave, because of the terms of

(1) [1894] 3 Ch. 400.

s. 5 of the Mercantile Law Amendment Act, 1856. Now Master Chitty had evidence before him, taken on examination and cross-examination of the defendants P. and R. Hothersall, as to what was the true position between them and the defendants Mandle and Fisher, and ultimately he simply made no order, that is to say, he refused, in accordance with the terms of the last part of r. 23, to make any order. From that an appeal was taken to Acton J., who held that Master Chitty was right in holding that the claims of P. and R. Hothersall to a set-off should be taken into consideration by him in deciding whether Saint should have the leave to issue execution. I ought to have said that upon the matters as they were ultimately presented to Master Chitty, it appeared that the defendants P. and R. Hothersall claimed that they were entitled to a larger sum respectively from Mandle and Fisher than Mandle and Fisher claimed as due to them by way of contribution. Acton J. has therefore decided that Master Chitty was right in holding that these claims of P. and R. Hothersall should be taken into consideration, and he refused to give leave to issue execution.

This appeal has been argued on the basis that leave is not necessary in an execution which has to be levied under s. 5 of the Mercantile Law Amendment Act, 1856. Under the old procedure as it stood under the Common Law Procedure Act of 1852 it was by s. 129 of that Act necessary before issuing execution under a judgment where there had been a change by death or otherwise of the parties to apply to the Court or to a judge for leave to do so. That section provided that where it should become necessary to revive a judgment by reason either of lapse of time, or of a change by death or otherwise, of the parties entitled or liable to execution, the party alleging himself entitled to execution, might either sue out a writ of revivor or apply to the Court or a judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appeared to the Court that such party was entitled to have execution of the judgment and to issue execution thereupon. Mr. Conway contended that that form of procedure which replaced the still more cumbrous

C. A. 1924

KAYLEY v. HOTHERSALL.

Pollock M.R.

procedure under a writ of scire facias was the lineal ancestor of Order XLII., r. 23; and that the requirements of Order XLII., r. 23, as to leave to issue execution were really based on the Common Law Procedure Act, 1852. He further contended that inasmuch as in the Mercantile Law Amendment Act, 1856, there was no reference to the procedure under s. 129 of the Common Law Procedure Act, 1852, it must be taken that s. 5 of the Act of 1856 was intended to be free of anything which was made necessary under s. 129 of the Act of 1852, and was designed to give a swift and speedy remedy to a defendant who had discharged the liability to a plaintiff and who was entitled to call upon his co-defendant for contribution. Now there is a very short answer to that argument. The Orders and Rules which are known to us in the Annual Practice are made under the statutory authority of the Judicature Acts, and have the force and effect of statutory enactments. To say that the procedure under s. 5 of the Mercantile Law Amendment Act, 1856, is released from and not restricted by the Common Law Procedure Act of 1852, does not get rid of the authority so attached to the Orders and Rules of Court made under a later statutory authority—namely, the Judicature Acts. This r. 23 under Order XLII. stands based upon statutory authority of recent date and later than the Mercantile Law Amendment Act.

There is no exception in favour of s. 5 of the Mercantile Law Amendment Act from the effect of r. 23 of Order XLII. In my judgment it cannot be said of that section that it stands apart from and is independent of the code of procedure laid down by r. 23 of Order XLII. We have, moreover, if not an actual authority, because it may be said to be obiter, an expression of opinion to this effect by Parker J. in *Dale* v. *Powell*. (1) He there says: "Anyhow, if he had assigned the judgments it appears to me that execution could not have been issued without the leave of the Court, there having been a change in the persons entitled to the benefits of the judgments. Upon an application to the Court, under the Order which applies for leave to execute the judgments, a

(1) 105 L. T. 291, 292.

question would have at once arisen as to how much ought to be recovered under them, having regard to the relations between the parties, and I think it probable that the Master in the actions in which the judgments had been recovered would have referred that question to the judge who was dealing with the partnership action." So that Parker J. definitely thought that r. 23 did apply to the procedure under s. 5 of the Mercantile Law Amendment Act, 1856, and did think that one of the matters which would have to be taken into account before deciding how far execution should issue would be what was the relation inter se between the parties who had applied for leave to issue execution and those upon whom execution was sought to be levied. The language of Parker J. seems to me appropriate and to accord with what I think is reasonable and must be applied to this case. Mr. Conway referred to *Batchellor* v. *Lawrence* (1) and called our attention to observations made by Sir William Erle C.J., but it does not appear that those observations really dealt with the points in this case, and they are moreover prefaced with the words "and for aught I know, after he has obtained the assignment," thereby clearly indicating that the Chief Justice did not intend to express a final opinion upon the matter.

It appears to me, therefore, for the reasons I have stated, that leave must be obtained under Order XLII., r. 23, where it is sought to put in force the powers given under s. 5 of the Mercantile Law Amendment Act. I would only add one word. Master Chitty, whose experience is unrivalled, and who has endeavoured to get at the bottom of the matter by hearing evidence, decided to make no order. It would be quite wrong to overlook the force and effect of his conclusion.

WARRINGTON L.J. I am of the same opinion. In the action the plaintiff Kayley obtained judgment against five defendants, two of whom, Fisher and Mandle, satisfied the judgment debt, and under the Mercantile Law Amendment Act, 1856, have obtained an assignment of the judgment to

(1) 9 C. B. (N. S.) 543, 550.

C. A. 1924

KAYLEY v. HOTHERSALL.

Warrington L.J.

a trustee for them from the plaintiff. They desired to issue execution through their trustee against the two defendants who had not satisfied their proportion of the judgment debt. They accordingly, through their trustee, made an application to Master Chitty for leave to issue execution. On that application the respondents, who were the defendants, who had not satisfied their proportion of the judgment debt, appeared and alleged that they had cross-claims against the defendants Fisher and Mandle. Master Chitty on that refused to give leave to issue execution, and made no order. There was then an appeal from that refusal to Acton J., who made an order declaring that Master Chitty was right in holding that the cross-claims should be taken into consideration and directing that the rest of the appeal as to what Master Chitty ought to have done on the merits should stand over until after the appeal to this Court. It is said that the appeal will be determined by the decision of the question whether in the case of an assignment of a judgment under s. 5 of the Mercantile Law Amendment Act leave to issue execution by the assignee is required, that is, whether under the provisions of Order XLII., r. 23, it is necessary in such a case to obtain the leave of the Court to issue execution. [His Lordship read the rule and continued :] In my opinion on the proper construction of s. 5 of the Mercantile Law Amendment Act and having regard to the state of the law at the time when that Act was passed the plaintiff puts the assignee of a judgment in the same position as the original judgment creditor was in and gives him no further or better right. By that section Mandle and Fisher became entitled to have an assignment by the plaintiff of the judgment, and then the section says "and such person," that is, the person named at the beginning of the section, the surety who has satisfied the judgment, is to be entitled to stand in the place of the creditor, that means that the person shall be entitled to the remedies which could have been had under the ordinary judgment. He may not be able to get those remedies unless he complies with the general law applicable to assignments of judgments at the time when the Mercantile Law

Amendment Act was passed. The trustee for the assignees of the judgment was not to be allowed to produce the judgment and then obtain execution on it, a new fact had arisen which he had to prove. The Act does not vest the judgment in the person having the right to call for an assignment of it, but the Act only gives a right to call for an assignment.

In the absence of authority I should say therefore it is clear that the remedies referred to in the Act are remedies which can be had in the case where there has been a change of parties. But there is a passage in the judgment of Parker J. in *Dale* v. *Powell* (1), which has been read by the Master of the Rolls, which is in accordance with the view I have taken, and which I should have followed even if I had not seen my way to arrive at the same conclusion.

There is no suggestion that there is any authority since 1856 which decides that assignments of judgments made in pursuance of s. 5 of the Mercantile Law Amendment Act were in any better position than assignments of judgments not under that Act. The proper order to be made is simply to dismiss this appeal.

SCRUTTON L.J. In this case co-sureties having satisfied a judgment have taken an assignment of it from the judgment creditor under s. 5 of the Mercantile Law Amendment Act and desire to raise the question whether it is necessary for them to obtain the leave of the Court to issue execution. In my opinion r. 23 of Order XLII. prevents their being able to issue execution without such leave, because they are not the persons by whom the judgment was originally obtained. That point now taken is not the point set out in the order made by the judge on application for leave to issue execution, which dealt with the right to take into consideration the cross-claims which were raised and was different from that intended to be raised, as Mr. Conway for the appellant now admits. The persons against whom execution is sought allege that they have cross-claims which if allowed would on balance wipe out the amount due from them as their

(1) 105 L. T. 291, 292.

C. A. 1924

KAYLEY v. HOTHERSALL.

Scrutton L.J.

contribution to the satisfaction of the judgment. I agree with the view taken by Parker J. in *Dale* v. *Powell* (1) that you may take into consideration the state of the accounts between the parties entitled and liable to execution, and the question whether you should give leave to issue execution seems in that case to become a matter of discretion. And when this case goes back counsel for the parties will no doubt consider the effect of *Bryant* v. *Torkington* (2), which shows that the judge in chambers has a discretion under Order XLII., r. 23, and is not bound to allow one judgment to be set off against another. The point whether the Master has exercised his discretion rightly has not been dealt with before us, because he has made no order and has given no reasons. I agree that the appeal on the point stated to us should be dismissed.

POLLOCK M.R. I should like to add a word on the question of what Master Chitty was to take into account in considering whether or not leave to issue execution should be granted. As to that I agree with what Scrutton L.J. has said about it.

WARRINGTON L.J. I also agree with what has been said on that by Scrutton L.J.

Appeal dismissed.

Solicitors for appellant: *Maples, Teesdale & Co., for Saul & Lightfoot, Carlisle.*

Solicitors for respondents: *Peter Thomas & Clark, for Pearson, Prior & Co., Manchester.*

(1) 105 L. T. 291, 292.

(2) (1897) 13 Times L. R. 315.

W. I. C.

FISHWICK, APPELLANT *v.* GYANI, RESPONDENT.

1925
Jan. 13, 14.

Insurance (National and Unemployment)—Offence—Failure by Employer to pay Contributions—Fine—Order to pay unpaid Contributions—Whether recoverable as Penalty or civil Debt—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 69, *sub-s.* 2—*National Insurance Act*, 1913 (3 & 4 *Geo.* 5, *c.* 37), *s.* 34, *sub-s.* 3—*Unemployment Insurance Act*, 1920 (10 & 11 *Geo.* 5, *c.* 30), *s.* 22, *sub-ss.* 2, 3.

Where orders are made against an employer under s. 34, sub-s. 3, of the National Insurance Act, 1913, and s. 22, sub-s. 3, of the Unemployment Insurance Act, 1920, for the payment by him to the Insurance Commissioners and the unemployment fund respectively of sums equal to the total amount of his unpaid contributions in respect of an employee, the sums so ordered to be paid are recoverable only as a civil debt.

CASE stated by the chief magistrate of the metropolitan police courts.

Two informations were laid by the appellant (an inspector under the National Insurance Acts and the Unemployment Insurance Acts) against the respondent, one for having failed to pay a contribution for the week commencing December 17, 1923, which he was liable to pay under the National Insurance Acts in respect of Marie Lane, an employed contributor, and the other for having failed to pay a contribution under the Unemployment Insurance Acts for the same week in respect of the said Marie Lane.

At the hearing it was proved that when the respondent was served with the summonses issued pursuant to the informations, there was also served upon him in each case notice of intention, in the event of his conviction, to give evidence of his failure to pay other contributions during the material period in respect of the said Marie Lane which he was liable to pay. These notices were given, in the one case, under s. 34, sub-s. 3, of the National Insurance Act, 1913, and in the other under s. 22, sub-s. 3, of the Unemployment Insurance Act, 1920.

The magistrate convicted the respondent of the offence alleged in each information, in the one case under s. 69, sub-s. 2, of the National Insurance Act, 1911, and in the other under s. 22, sub-s. 2, of the Unemployment Insurance Act, 1920,

1925

FISHWICK v. GYANI.

and in each case he imposed a fine of 5*l.* and 2*l.* 2*s.* costs, and in default of payment of the fine and costs, it appearing that the respondent had no sufficient goods to satisfy them, he adjudged that the respondent be imprisoned for one month.

It was proved that the amount of the contribution payable under the National Insurance Acts in respect of the said Marie Lane for the week commencing December 17, 1923, was 9*d.*, and that the respondent had failed to pay other contributions, amounting in all to 18*s.*, under those Acts in respect of the said Marie Lane during the year preceding the date of the information. It was also proved that the corresponding amounts for unemployment insurance which the respondent had failed to pay in respect of the said Marie Lane were 1*s.* 3*d.* and 30*s.* The magistrate ordered that the respondent should pay to the Insurance Commissioners the said sums of 9*d.* and 18*s.* and to the unemployment fund the said sums of 1*s.* 3*d.* and 30*s.*, and in each case, in default of payment, the magistrate directed that each of those amounts should be recovered as a civil debt.

On each information the appellant contended that the unpaid contributions and the sums equal to the amount of the other unpaid contributions should be recoverable as part of the penalty imposed, and not as a civil debt. After considering the Acts and *Rex* v. *Baggallay* (1) the magistrate decided that those sums were not part of the penalty and were recoverable only as a civil debt, and the question for the opinion of the Court was whether he was right in so deciding.

Harold Murphy for the Minister of Health. The question is whether the amounts of unpaid contributions under the National Insurance Acts, 1911 and 1913 (2), and under the

(1) [1913] 1 K. B. 290.

(2) National Insurance Act, 1911, s. 69, sub-s. 2: "If any employer has failed to pay any contributions which . . . . he is liable to pay in respect of an employed contributor . . . . he shall for each offence be liable on summary conviction to a fine not exceeding 10*l.*, and where the offence is failure or neglect . . . . to make any such contributions, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay, which sum when paid shall be

Unemployment Insurance Act, 1920 (1), ordered by the magistrate to be paid by the respondent are recoverable as part of the penalty imposed for his offence in having failed to pay a contribution, or whether, as the magistrate decided, those sums are recoverable only as a civil debt. If the magistrate's view is right, the respondent can be imprisoned for non-payment of the sums only if it be proved that he has or has had since the date of the order the means to pay and nevertheless has refused or neglected to pay the amount: see ss. 6 and 35 of the Summary Jurisdiction Act, 1879; whereas proof of means is unnecessary if the other view is correct. It is submitted that the scheme of legislation in the Acts in question shows that the order for payment of the unpaid contributions is part of the penalty. It is made in the same proceeding—namely, on the information alleging the offence of failure to pay a contribution, and the liability arises on the conviction. This view is emphasized if regard is had to s. 101, sub-s. 2, of the Act of 1911 which, in the case of the conviction of an employer for having failed to pay a contribution, rendered the employer liable to pay to the unemployment fund a sum equal to three times the amount he has refused or neglected to pay. That is obviously a penalty. It is true that that provision has now been repealed,

treated as a payment in satisfaction of such contributions."

National Insurance Act, 1913, s. 34, sub-s. 3: "The time within which proceedings may be taken under sub-s. 2 of s. 69 of the principal Act against an employer charged with an offence of failing or neglecting to pay any contribution in respect of an employed contributor shall be one year from the date of the commission of the alleged offence, and where an employer has been convicted of such an offence then, if notice of the intention to do so is served with the summons or warrant, evidence may be given of failure or neglect on the part of the employer to pay other contributions in respect of that employed contributor during the year preceding the date when the information was laid, and on proof of such failure or neglect the employer shall be liable to pay to the Insurance Commissioners a sum equal to the total amount of all the contributions which he is so proved to have failed or neglected to pay."

(1) Sect. 22, sub-ss. 2 and 3, of the Unemployment Insurance Act, 1920, contain provisions similar to those in s. 69, sub-s. 2, of the National Insurance Act, 1911, and s. 34, sub-s. 2, of the National Insurance Act, 1913, with this difference, that the unpaid contributions are to be paid to the unemployment fund.

1925

FISHWICK v. GYANI.

but it indicates the Legislature's view as to the penal nature of these payments.

[He cited *Reg.* v. *Paget* (1); *Vernon* v. *Watson* (2); *Reg.* v. *Kerswill* (3); *Reg.* v. *Truscott* (4); *In re Gamble* (5); and *Rex* v. *Baggallay*. (6)]

C. W. Lilley for the Minister of Labour. Under the Acts now under consideration the statutory obligation of an employer is not to pay money, but to affix stamps to a card. If he fails to do this, no civil debt is created, but he is liable to be proceeded against by information, the appropriate procedure for recovering a penalty. Moreover, if the unpaid contributions were treated as a debt due from the employer there would be no need for the provision that the amount when paid "shall be treated as a payment in satisfaction of such contributions."

Giveen for the magistrate. The question is whether the statutes in question give the power to imprison the respondent in the absence of proof of means. Such a power must be given in clear language. The language of the statutes under consideration, so far from clearly conferring such a power, implies that no such power is given. It is not correct to say that the unpaid contributions are recoverable by the information laid in respect of the offence of failing to pay a contribution; they are recoverable under the notice served under s. 34, sub-s. 3, of the Act of 1913, and s. 22, sub-s. 3, of the Act of 1920. If the unpaid contributions were a penalty they would go to the Crown, whereas there is specific provision that they are payable in the one case to the Insurance Commissioners and in the other to the unemployment fund. The amounts unpaid constitute a debt.

[He was stopped.]

Harold Murphy replied.

LORD HEWART C.J. stated the facts and continued: From the practical point of view the question raised by this case

(1) (1881) 8 Q. B. D. 151.
(2) [1891] 2 Q. B. 288.
(3) [1895] 1 Q. B. 1.
(4) (1899) 81 L. T. 188.
(5) [1899] 1 Q. B. 305.
(6) [1913] 1 K. B. 290.

is one of much importance. It is whether on default by the respondent in complying with that part of the order relating to the unpaid contributions he may, upon the mere proof of that default, be sent to prison, or whether he can be sent to prison only if it be further shown that he has or has had the means to pay and nevertheless has not paid the amounts in question. The distinction is clearly drawn, for example in ss. 5, 6 and 35 of the Summary Jurisdiction Act, 1879, between imprisonment for non-payment of money, and the machinery for the recovery of sums recoverable as civil debts. In this case the question turns upon the National Insurance Acts of 1911 and 1913, and the Unemployment Insurance Act, 1920.

To deal first with the question arising under the National Insurance Acts : there are three such Acts, but for the present purpose it is necessary to refer only to the Act of 1911, under s. 69, sub-s. 2, of which it is provided that if an employer has failed to pay any contributions which he is liable to pay in respect of an employed contributor, he shall for that offence be liable on summary conviction to a fine not exceeding 10*l.*, and where the offence is failure or neglect to make any such contribution, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay, which sum, when paid, shall be treated as a payment in satisfaction of such contributions. It is said, and I think with force, that if a person in default is to be liable, without proof of means, to imprisonment on failure to pay, that liability ought clearly to appear. What is the true construction of the sub-section ? It seems to me that its framework points a distinction between a fine on the one hand and a payment on the other hand. The payment is to be of a sum equal to the amount of contributions which the employer has failed or neglected to pay, and that is the sum which he has to pay to the Insurance Commissioners. In other words, the sub-section seems to recognize, as other phrases in the same statute seem to indicate, that whatever may be the particular method of paying that which is due, the employer is a person who is under an

1925

FISHWICK v. GYANI.

Lord Hewart C.J.

obligation to pay certain contributions. The proviso to the sub-section says that "no person shall be liable to any penalty in respect of any matter if he has acted in conformity with any decision in respect thereto by the Insurance Commissioners, or, if the matter is one which the Insurance Committee is competent to decide, in conformity with its decision." Sect. 70, sub-s. 1, enacts that "where an employer has failed or neglected to pay any contributions which under this Part of this Act he is liable to pay in respect of a person being a member of an approved society in his employment, and by reason thereof that person has been deprived in whole or in part of his right to any benefits which would otherwise have been payable to him, he shall be entitled to take proceedings against the employer for the value of the right of which he has been so deprived. . . . ." By sub-s. 2 of that section it is provided that "proceedings may be taken under either this or the last preceding section notwithstanding that proceedings have also been taken under the other section in respect of the same failure or neglect to pay contributions." In like manner it will be seen, if one looks at s. 34, sub-s. 3, of the Act of 1913, that a limitation of time is placed on proceedings under s. 69, sub-s. 2, of the Act of 1911, and where the proper steps are taken and the proper proof is given the employer is made liable to pay to the Insurance Commissioners a sum equal to the total amount of all contributions which he is so proved to have failed or neglected to pay. When one turns to the Unemployment Insurance Act the matter becomes a little more clear. It is quite true that if one looks only at that part of the Act of 1911 which is concerned with unemployment insurance, and in particular at s. 101 of that Act, it appears that in case of default an employer might be ordered to pay a sum equal to three times the amount which he has refused or neglected to pay. But by the later Act, by which that provision has been superseded, the treble burden has disappeared and, under the Act of 1920, in such a case the employer is to be liable to the unemployment fund in a sum equal to the total of all the contributions which it is proved that he has failed or neglected to pay. It is to be

observed that in that Act, as if for the purpose of further emphasizing the distinction already pointed in s. 101, sub-s. 2, of the Act of 1911 between liability to a fine on the one hand and liability to pay a sum of money on the other hand, these two different matters are dealt with in two separate sub-sections. Sect. 22, sub-s. 2, is concerned with the liability to a fine not exceeding 10*l.* for each offence. Then comes sub-s. 3, which enacts that "where an employer has been convicted under the foregoing provisions of this section of the offence of failing or neglecting to pay any contribution under this Act, he shall be liable to pay to the unemployment fund a sum equal to the amount which he has so failed or neglected to pay, and on such a conviction, if notice of the intention to do so has been served with the summons or warrant, evidence may be given of the failure or neglect on the part of the employer to pay other contributions in respect of the same person during the year preceding the date when the information was so laid, and on proof of such failure or neglect the employer shall be liable to pay to the unemployment fund a sum equal to the total of all the contributions which he is so proved to have failed or neglected to pay." According to the natural and ordinary meaning of words that sub-section seems to draw a clear distinction between the fine on the one hand and the liability to pay moneys to the unemployment fund on the other hand. More than that, by sub-s. 6 of the same section it is further provided that "nothing in this section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings, and all such sums shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt." It is suggested that because the words "civil debt" are employed there, it follows that where such moneys are or ought to be paid as something consequential upon a conviction they are not to be recovered as a civil debt in the case of default by the employer. In my opinion that argument is unsound. The character of the payment which is to be made is not affected by the circumstance that

1925

FISHWICK v. GYANI.

Lord Hewart C.J.

the particular procedure adopted is a complaint of an offence. When the forms actually used in these proceedings are looked at it will be seen that one is an information relating to the offence and the other is a notice of evidence proposed to be offered if and when a conviction for the offence has taken place.

During the course of an extremely able argument various cases were referred to. They turned upon the particular phrases employed in different statutes, but two of them are, I think, helpful, although they are not on all fours with the present case. In *Reg.* v. *Kerswill* (1) Mathew J. said, referring to the words "to be recovered as a penalty," to be found in the statute then under consideration: "But it is said that the last words of the section, 'as a penalty,' stamp the non-payment with a criminal character. The words are, 'to be recovered as a penalty'—that is, to be recovered in the same way as a penalty. Those words do not, in my opinion, alter the nature of the obligation itself, which remains a purely civil obligation." In the present case there are no such words to be found as "to be recovered as a penalty," and I am of opinion that the observations I have cited from the judgment of Mathew J. may be repeated a fortiori with reference to the topic of controversy here. The other case I desire to refer to is *Vernon* v. *Watson* (2)—a decision turning on s. 16, sub-s. 9, of the Friendly Societies Act, 1875: "If any person obtains possession by false representation or imposition of any property of a society, or having the same in his possession withholds or misapplies the same, or wilfully applies any part thereof to purposes other than those expressed or directed in the rules of the society . . . . he shall, on the complaint of the society . . . . be liable on summary conviction to a penalty not exceeding 20*l.* and costs, and to be ordered to deliver up all such property, or to repay all moneys applied improperly, and in default of such delivery or repayment, or of the payment of such penalty and costs aforesaid, to be imprisoned . . . . for any time not exceeding three months." Fry L.J., using very much the

(1) [1895] 1 Q. B. 1, 6.

(2) [1891] 2 Q. B. 288, 292.

same words as those already used by Lord Halsbury in the same case, said this: "Sub-s. 9 does two things: it inflicts a penalty, and enables the magistrates to make an order for delivery up of property or the repayment of money. Such an order is an order giving effect to civil rights. Then the sub-section couples together 'such delivery or repayment' and 'the payment of such penalty,' and provides that, if default be made in doing both, the magistrates shall have power to send the person making the default to prison for a specified time. That, to my mind, is execution of the judgment for repayment of the money. It is execution of so much of the order as is of a civil nature. The two things, the civil and criminal procedure, are mixed and bound together in the sub-section." In the statutes we are considering there is no such mixing or binding together. That which is civil remains civil, that which is criminal remains criminal; there are no words linking them together and stamping them with one and the same character. In my opinion the magistrate was right, and therefore this appeal fails.

AVORY J. I am of the same opinion. The practical question is whether the remedy for non-payment of contributions under the National Insurance Act and the Unemployment Insurance Act is to be followed under s. 5 of the Summary Jurisdiction Act, 1879, or whether the remedy is that provided under s. 6 of that Act for the recovery of civil debts. So far as the question arises under the Unemployment Insurance Act I cannot see any room for doubt, because under the Act of 1911 in the part dealing with unemployment insurance there is an express provision in s. 101, sub-s. 4, that "nothing in this section shall be construed as preventing the Board of Trade from recovering any sums due to the unemployment fund by means of civil proceedings, and all such sums shall be recoverable in such proceedings as debts due to the Crown." That in itself clearly contemplates that these unpaid contributions to the unemployment fund are debts due to the Crown and debts which may be recovered by means of civil proceedings. That is further illustrated by

1925

FISHWICK v. GYANI.

AVORY J.

the provisions of the Unemployment Insurance Act, 1920, which by s. 22, sub-s. 6, says that "nothing in this section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings, and all such sums shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt." So far therefore as these contributions under the Unemployment Insurance Act are concerned they are in my opinion brought clearly within the provisions of s. 35 of the Summary Jurisdiction Act, 1879, which provides that "any sum declared by this Act, or by any future Act, to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a Court of summary jurisdiction, shall be deemed to be a sum for payment of which a Court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts." Then follow in the same section the provisions as to the course to be followed where the sum is recoverable as a civil debt and not as a penalty.

With regard to the National Insurance Act I thought there was considerable force in the arguments of Mr. Murphy and Mr. Lilley. Reading s. 69, sub-s. 2, of the Act of 1911, it might appear at first sight that the unpaid contributions are treated as part of the penalty for the offence, seeing that it provides that if an employer has failed to pay any contribution he shall for each offence be liable, first to a fine and next to some other liability. That might seem to give ground for saying that it is all one penalty which follows upon the conviction for the offence, but when one looks at the provisions with regard to the manner in which these unpaid contributions are to be paid it will be found that they have to be paid not to the Crown, which is the ordinary person to whom penalties go, but to the Insurance Commissioners, and the amount, when paid, is to be treated as a payment in satisfaction of such contributions. I cannot resist the conclusion that this is intended to be a payment of the employer's civil debt which is due to the Insurance

Commissioners. If it had been intended as part of the penalty for the offence it would not have been necessary to provide what was to become of the money after it was paid ; it would in the ordinary course go to the Crown. It is, I think, also clear that, although an information may be necessary for the purpose of charging that an offence has been committed, it is quite consistent with the laying of such an information that complaint shall be made at the same time of the non-payment of these contributions, and in my view that is the practical way in which the matter comes before the magistrate. There is an information for the offence and at the same time a complaint, either verbal or written, that these contributions remain unpaid, and it is upon the complaint portion, as distinguished from the information for the offence, that the magistrate rightly in this case ordered that the contributions should be recoverable as a civil debt. For these reasons I agree that the appeal should be dismissed.

ACTON J. I agree.

Appeal dismissed.

Solicitors : *Solicitor for Ministry of Health ; Solicitor for Ministry of Labour ; Solicitor to Treasury.*

J. S. H.

C. A.
1925
Jan. 20.

[IN THE COURT OF APPEAL.]

RUSSOFF *v.* LIPOVITCH.

Landlord and Tenant—Dwelling-house—Action for Recovery of Possession —Jurisdiction of County Court—"Claim arising out of this Act"— Increase of Rent, &c., Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 17, *sub-s.* 2.

An action by a landlord to recover from a tenant possession of a house to which the Increase of Rent, &c., Act applies is a claim or proceeding "arising out of this Act" within the meaning of s. 17, sub-s. 2, and the county court has jurisdiction to entertain the action, notwithstanding that the rent payable by the tenant is in excess of 100*l.*

Judgment of McCardie J. reversed.

APPEAL from McCardie J. (1)

By an agreement made on July 27, 1917, the plaintiffs' predecessor in title let to the defendant a dwelling-house in the Mile End Road for three years at a rent of 65*l.* a year. The agreement contained a clause entitling the landlord to re-enter in case the rent should be in arrear for seven days. On the expiration of the term the defendant remained in possession, claiming the protection of the Increase of Rent, &c., Act, 1920. In pursuance of notices in that behalf the lessors from time to time increased the rent by amounts which they claimed to be permitted by the said Act, and at all material times the rent claimed to be payable by the defendant to the plaintiffs was 2*l.* 6*s.* per week, which is the equivalent of an annual rent of 119*l.* 12*s.* On September 18, 1924, the plaintiffs brought this action in the High Court claiming to recover possession of the house on the ground that the rent was in arrear, and alleging in their writ that "occupation is being held over by the defendant under the provisions of the Increase of Rent, &c. (Restrictions), Act, 1920." They also claimed 36*l.* arrears of rent at 2*l.* 6*s.* a week from May 26, 1924, to September 15, 1924, and mesne profits with possession. The plaintiffs having applied for final judgment under Order XIV., the defendant in his affidavit denied that he owed the rent claimed, and alleged that he had been

(1) [1924] W. N. 323.

charged rent in excess of what was permitted by the statutory provisions for the time being applicable to the premises and that he had overpaid the rent. The Master made an order that the defendant should be at liberty to defend, and that the action should be remitted for trial to the Whitechapel County Court under s. 1 of the County Courts Act, 1919 (9 & 10 Geo. 5, c. 73). (1) On appeal to the judge in chambers McCardie J. reversed the Master's order, and allowed the action to remain in the High Court upon the ground that under the County Courts Act, 1888, ss. 59, 138 and 139, the county court would have no jurisdiction to entertain the action, as the rent claimed exceeded 100*l.* a year, and that it had no jurisdiction under s. 17, sub-s. 2, of the Increase of Rent, &c., Act, 1920 (2), as the claim was not one "arising out of this Act." He was of opinion that the Rent Restrictions Act gave no jurisdiction to entertain an action for recovery of possession, but only imposed restrictions on the landlord's right of recovery at common law; that even where the house was one to which the Rent Restrictions Act applied the action was still an ordinary common law action of ejectment, and any reliance upon the Act arose only by way of defence.

The defendant appealed.

H. G. Garland for the appellant. The action to recover possession of this house is a "claim or proceeding arising out of this Act" within the meaning of s. 17, sub-s. 2, of the

(1) By s. 1 of the County Courts Act, 1919: "In any action commenced in the High Court where —(3.) the plaintiff's claim is for recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant . . . . whose term . . . . has become liable to forfeiture for non-payment of rent, and the action could have been commenced in the county court," the Court or a judge may order the action to be transferred to a county court.

(2) By s. 17, sub-s. 2, of the Increase of Rent, &c., Act, 1920: "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

C. A. 1925

RUSSOFF v. LIPOVITCH.

Act of 1920. Those words are not to be interpreted in their literal sense. They are a loose expression intended to convey that the claim is one in the course of the trial of which the provisions of the Act will necessarily come in question. The plaintiffs' right of recovery depends upon the question whether the rent was in arrear. The defendant denies that it was, and on the contrary says that he has already overpaid it. Which of those contentions is right depends upon whether the difference between the reserved rent, 65*l.*, and the rent actually charged and paid, 119*l.* 12*s.*, was an increase permitted by the Rent Restrictions Act. By s. 5, sub-s. 1, of that Act "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies . . . . shall be made or given unless (inter alia) (*a*) any rent lawfully due from the tenant has not been paid." In *Epsom Grand Stand Association* v. *Clarke* (1) it was held that where a landlord seeks to recover possession of a house to which the Act applies the onus is on him to show that the case falls within one or other of the exceptions to the restriction imposed by that sub-section. Therefore in the present case it lies on the plaintiffs to show that the rent, for non-payment of which they are seeking to eject the defendant, was lawfully due, and that they cannot show without satisfying the Court that increases claimed were permitted by s. 2. Moreover the plaintiffs here actually allege in their writ that the defendant is a statutory tenant holding over under the protection of the Act. In *Gill* v. *Luck* (2) Atkin L.J. said: "When once it was shown that the premises came within the Act, the proceedings to recover possession must be within the Act." And it is extremely desirable that all such actions should be brought in the county court, for in the course of such actions incidental matters frequently arise the jurisdiction to determine which is given exclusively to the county court—e.g., applications for the suspension or reduction of increases of rent under s. 2, sub-s. 1 (*a*), or as to the reasonableness of the amount claimed for repairs under s. 2, sub-s. 1 (*d*), or applications for apportionment of the standard rent under s. 12, sub-s. 3. It would

(1) (1919) 35 Times L. R. 525. (2) (1923) 40 Times L. R. 38, 39.

be highly inconvenient that the hearing of an action in the High Court should have to be adjourned to allow of such applications being made to the county court, and the Legislature must be assumed to have had that inconvenience in view when they enacted s. 17, sub-s. 2.

Eddy for the respondents. The plaintiffs' claim, so far as respected the recovery of possession, did not arise out of the Act. There is no provision in the Act which gives any power to order recovery of possession. All that the Act does is to restrict the landlord's common law rights. It is the defendant in such an action, not the plaintiff, who relies on the Act, and the mere fact that it is obligatory on the plaintiff to negative the defendant's statutory defence does not cause the claim to arise out of the Act. It is immaterial that here the plaintiffs in their writ alleged that the defendant was holding over under the Act. If a plaintiff suing on a contract prima facie required by the Statute of Frauds to be in writing, and knowing that the statute was going to be pleaded, by way of anticipating the defence averred in his claim facts which would take the case out of the statute, no one would say that the claim arose out of the Statute of Frauds. The dictum of Atkin L.J. in *Gill* v. *Luck* (1) was obiter only. *Bensusan* v. *Bustard* (2) is an authority in favour of the respondents' contention. There an action was brought in the county court to recover possession of a house to which the Act applied. The county court judge refused to make an order for possession, but gave no direction as to costs. By s. 113 of the County Courts Act, 1888, the costs of any action in default of a special direction are to abide the event. By the Increase of Rent, &c., Rules, 1916, r. 17, "The costs of any application under the Act . . . . shall be in the absolute discretion of the Court." The registrar taxed the defendant's costs under the Act of 1888. It was held by the Divisional Court that the registrar was right, a decision which involved the conclusion that the action was not an application under the Rent Restrictions Act, for if it were the defendant, although successful, was not, in the absence of an exercise of discretion by the Court,

(1) 40 Times L. R. 38, 39. (2) [1920] 3 K. B. 654.

C. A. 1925

RUSSOFF v. LIPOVITCH.

entitled to any costs. In Scotland the same view was taken in *Purves* v. *Graham*. (1) That was an action of "removing" in the case of a house to which the Act applied. The action was brought in the Sheriff's Court in the ordinary form and not as "a summary cause." By an Act of Sederunt (Rule of Court), 1920, it was provided that any application to the sheriff under the Rent Restrictions Act should be "a summary cause," a form of proceeding which allowed the defender a shorter time in which to appear and involved other differences of procedure. The pursuer in her original averments alleged that she reasonably required the dwelling-house for her own occupation, thereby referring to the Rent Restrictions Act. The defender thereupon objected that the proceedings were incompetent by reason of their not being in the form of a summary cause. The pursuer amended her pleading and omitted all reference to the Rent Restrictions Act, whereby it became an ordinary action of removing, to which the defender pleaded protection under the Act. It was held by the Second Division that, as amended, the action was competent. The Lord Justice Clerk said: "It is quite true that in defence to that common law action there are pleas founded on the Rent Restriction Act, which may or may not be successful, but the common law action remains intact, unaffected by the statute"; and Lord Hunter said: "There is not in any of the provisions of the Rent Restriction Act any clause prohibiting such an action as the present being brought." The decision of the Court, therefore, was that an action for recovery of possession in the ordinary form containing no reference to the Act in the pursuer's pleading was not a proceeding "under the Rent Restrictions Act."

BANKES L.J. With great respect to McCardie J. I am unable to agree with his conclusion. The parties here were landlord and tenant, the landlord seeking to recover possession of a house to which the Rent Restrictions Act applied, but the rent being paid for which at the time of action brought exceeded 100*l*. Therefore if the matter turned upon the

(1) 1924 S. C. 477.

County Courts Act, 1888, the county court would have had no jurisdiction to entertain the claim. The house had originally been let to the defendant under an agreement in writing dated July 27, 1917, for a term of three years, the rent reserved being 65*l.* a year. The agreement provided that if the rent should be in arrear for seven days the landlord should be entitled to re-enter. The tenancy expired in 1920, and from that date onwards the defendant continued to occupy as statutory tenant. The plaintiffs, availing themselves as they contended, but as the defendant disputed, of the rights given them by the Rent Restrictions Act, had increased the rent from 65*l.* a year to a rent of 2*l.* 6*s.* a week, which is equivalent to an annual rent of 119*l.* 12*s.* The plaintiffs brought their action in the High Court claiming possession on the ground of forfeiture for non-payment of rent, and also claiming a sum of 36*l.* 16*s.* as arrears of rent from May 26, 1924, to September 15, 1924, and mesne profits until possession. It seems to me that on the plaintiffs' own showing they are seeking the assistance of the Rent Restrictions Act in support of their claim. In the first place they are claiming rent at the rate of 2*l.* 6*s.* a week instead of the original rent of 65*l.* a year, and they do so upon the ground that they are entitled to raise the rent to that extent under the provisions of the statute ; and secondly, they are claiming to recover possession for non-payment of rent, which is a ground for recovery of possession only upon the assumption that they are relying upon s. 15, sub-s. 1, of the Act of 1920, which provides that " A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe . . . . all the terms and conditions of the original contract of tenancy " ; or upon the assumption that they are relying on s. 5, sub-s. 1, by which " No order or judgment for the recovery of possession of any dwelling-house to which this Act applies . . . . shall be given unless (*a*) any rent lawfully due from the tenant has not been paid." On the face of the plaintiffs' own statements they seem to me to be claiming both rent and possession by virtue of the Act,

C. A. 1925

RUSSOFF v. LIPOVITCH.

Bankes L.J.

and under those circumstances the case is clearly one in which it is correct to say that the claim or proceedings arise out of the Act. But I am not content to rest my judgment there, for I think that it is necessary to consider the Act as a whole. That it is not well drafted is beside the question. What we have to consider is the sense in which the Legislature intended the words which it has used to be understood. On looking into the statute I think it will be found that the Legislature is treating any action by a landlord to recover premises to which the Act applies as a proceeding arising out of the Act, although it is quite true that, strictly speaking, the right of recovery is independent of the statute, the landlord being entitled to bring an action of ejectment at common law. If he attempts to enforce his common law right to recover possession, and the house is one to which the Act applies, the onus lies on him, as we have already laid down in *Epsom Grand Stand Association* v. *Clarke* (1), to show that the case falls within one or other of the seven exceptions, (*a*) to (*g*), specified in s. 5, sub-s. 1, and he must also satisfy the Court that it is under the circumstances reasonable to make the order. It is for the plaintiff to establish that his case is one in which the statute justifies his recovery of possession. The view that the language of s. 17, sub-s. 2, was not intended to be very strictly interpreted may be supported by reference to s. 5, sub-s. 5, by which " an order or judgment against a tenant for the recovery of possession of any dwelling-house . . . . under this section " is not to affect the right of a sub-tenant. Possession is not recovered under the section in the ordinary sense of those words, but the Legislature nevertheless regards the order for possession as made under the section. So again sub-s. 6 of the same section speaks of a landlord who " has obtained an order or judgment for possession . . . . under this section on the ground that he requires a dwelling-house for his own occupation." The order is permitted by the section, but it is not obtained under it. If the landlord is seeking to turn out the tenant on grounds which are to be found only in the statute, it seems

(1) 35 Times L. R. 525.

to me impossible to say that the action, although in a sense it is a common law action, is not under the circumstances a "claim or other proceeding arising out of this Act" within the meaning of s. 17, sub-s. 2. Moreover it seems to me that this view of the Legislature's meaning is emphasized by the fact that in the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), passed a few months after the Rent Restrictions Act, there is this provision in s. 3, sub-s. 2, "Notwithstanding anything in any Act, it shall not be lawful for any party in a county court or any other inferior court of civil jurisdiction to require any action or other matter arising under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to be tried with a jury." I cannot but think that in so enacting the Legislature had in mind this very class of cases, the object being to provide that in those cases in which no order for possession was to be made unless it appeared to the Court to be reasonable, the plaintiff should not be entitled to a jury. It assumed that the county court had jurisdiction to deal with such cases, and that the action would in the ordinary course be brought in that Court. For these reasons I think that the view taken by McCardie J. was wrong, and that the view which we expressed in *Gill* v. *Luck* (1), although possibly it was not actually necessary to the decision in that case, was correct. The appeal must be allowed.

SCRUTTON L.J. The question which is raised on this appeal is whether the Master was right in remitting to the county court an action in which the plaintiffs sought to recover possession of a house, the occupation of which was being held over by the tenant under the provisions of the Rent Restrictions Act, and arrears of rent at the rate of 2*l.* 6*s.* a week. 2*l.* 6*s.* a week is more than 100*l.* a year. The Master has power under s. 1 of the County Courts Act, 1919, to remit an action commenced in the High Court where "the plaintiff's claim is for recovery of land, with or without a claim for rent or mesne profits by a landlord against a tenant .... whose term .... has become

(1) 40 Times L. R. 38.

C. A. 1925

RUSSOFF v. LIPOVITCH.

Scrutton L.J.

liable to forfeiture for non-payment of rent, and the action could have been commenced in the county court." The question then is whether a claim to recover possession of a house to which the Rent Restrictions Act applies, but the rent of which exceeds 100*l.* a year, is within the jurisdiction of the county court. That turns on s. 17, sub-s. 2, of the Rent Restrictions Act, 1920: "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court." It is contended on behalf of the landlord that the claim to recover possession is a claim arising, not out of the Rent Restrictions Act, but out of the common law. That contention is, to my mind, not merely very technical, but also inaccurate. There was a common law existing at the time of Lord Coke, but in many respects it has been materially altered by later statutes, so that many forms of relief can be obtained at the present day which could not have been asked for under the common law in Lord Coke's time. It is not, in my opinion, accurate to say that the claim in the present case arises out of the common law. It arises out of the common law as modified by subsequent statutes. The original common law right to possession has been modified by the Rent Restrictions Act in the case of houses to which the Act applies, and a claim for the possession of such a house cannot any longer be made under the common law, for the common law has gone. When one comes to look at the language of this statute, treating the statute as its own glossary, and to ask in what sense the Legislature used the phrase "arising out of this Act," the first thing that strikes one is that it is badly and loosely drafted. The words "arising out of this Act or any of the provisions thereof" are redundant. A claim cannot arise out of the Act without also arising out of its provisions, nor can it arise out of its provisions without arising out of the Act. There was no necessity for the double phrase. Then when we turn back to s. 5, sub-s. 5, we find the Legislature

speaking as though an order against a tenant for possession of a dwelling-house could be made under that section, whereas in fact there is nothing in that section which authorizes the making of such an order, all that it does is to restrict the previously existing right to make the order; and the same language is used in sub-s. 6: "Where a landlord has obtained an order . . . . for possession . . . . under this section." Then again the same inaccurate form of expression is to be found in s. 15, sub-s. 1: "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house," but there is no provision of the Act which entitles him to retain possession. The draftsman has throughout this Act used language very loosely, and drafted the Act as though he were impliedly reading into it the existing common law, treating an order made by the Court, or a right conferred on the tenant, or a proceeding taken by the landlord, under the joint effect of the Act and the common law, as if it were made, conferred, or arising "under this section," "by virtue of the provisions of this Act," or "out of this Act." Assistance in arriving at the sense in which those phrases were used is to be got by looking at the Administration of Justice Act passed in the same session of Parliament. That Act provided in s. 3, sub-s. 2, that "it shall not be lawful for any party in a county court . . . . to require any action or other matter arising under the Increase of Rent &c., Act, 1920, to be tried with a jury." Now Mr. Eddy's argument involves the proposition that an action for the recovery of a house to which the Act applies can still be tried with a jury, because according to him it does not arise under the Rent Restrictions Act but out of the common law. But, although it is not necessary to decide the point in the present case, I am satisfied that Parliament in the Administration of Justice Act meant to include among the actions arising under the Rent Restrictions Act which were no longer to be tried with a jury an action for the recovery of possession of a house to which that Act applied. As I read the decision of this Court in *Gill* v. *Luck* (1) Atkin L.J. certainly, and Bankes L.J.

(1) 40 Times L. R. 38.

C. A. 1925

RUSSOFF v. LIPOVITCH.

Scrutton L.J.

inferentially, took the same view that I am now expressing, and I respectfully think that they were right. Moreover in the present case the plaintiffs are claiming to recover not only possession of the house but also arrears of rent, which rent is claimed to be payable at a rate increased under the provisions of the Rent Restrictions Act above that at which the rent reserved by the tenancy agreement was payable, and there could be no possible ground for suggesting that that claim for rent did not arise out of the Act. In these circumstances I think that the county court had jurisdiction under s. 17, sub-s. 2, to try this case, and that consequently the Master had power to remit it to the county court under the Act of 1919.

ATKIN L.J. In this case the plaintiffs brought their action in the High Court to recover possession of premises to which undoubtedly the Rent Restrictions Act applies, and also for recovery of arrears of rent and mesne profits. They applied to the Master for judgment under Order XIV. The Master, no doubt relying on the principles laid down by the Court of Appeal in *Gill* v. *Luck* (1), refused the application and remitted the case to the Whitechapel County Court under s. 1 of the County Courts Act, 1919. On appeal McCardie J. reversed the order of the Master upon the ground that in his opinion the action was not one which could have been commenced in the county court, and that consequently the Master had no jurisdiction to remit. Whether that view is right depends entirely upon the construction to be put upon s. 17, sub-s. 2, of the Rent Restrictions Act, 1920. The question is whether an action for the recovery of premises to which the Act applies is a claim or proceeding "arising out of this Act or any of the provisions thereof." In my opinion it is. It is true that there are great difficulties in construing different parts of this Act, owing to the manner in which it has been drafted; but in this particular case the draftsman has been his own interpreter, for he has used the same or similar language in other sections the meaning of

(1) 40 Times L. R. 38.

which is reasonably clear. Thus s. 5, sub-s. 5, provides that "An order or judgment against a tenant for the recovery of possession of any dwelling-house . . . . under this section shall not affect the right of any sub-tenant, to whom the premises or any part thereof have been lawfully sublet before proceedings for recovery of possession . . . . were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant." The object of that is plain. It is a clause which is intended to be the charter of the sub-tenant. Provision that a judgment for the ejectment of the immediate tenant should not affect the position of the sub-tenant was absolutely necessary for the protection of the class of persons whom the Act was designed to protect. But if the decision of McCardie J. is right the sub-tenant would get no protection from the section, for it is only against an ejectment order "under this section" that he is protected, and that is an order which according to the learned judge can never have any existence. The same observation applies to sub-s. 6 of that section, by which if a landlord obtains an order for possession "under this section" by means of misrepresentation the Court may order him to pay compensation to the former tenant. If the judgment appealed from is right the relief thereby afforded to the tenant is altogether illusory. If s. 17, sub-s. 2, be read by the light of those two sub-sections the sense in which its language is used becomes reasonably plain. The landlord, having had his ordinary right of ejectment seriously restricted by s. 5, sub-s. 1, must, if he wishes to obtain an order for the recovery of possession, show affirmatively that he has satisfied one or other of the several conditions specified in that sub-section, and also that it is reasonable for the Court to make the order. Under those circumstances it seems reasonable enough to say that a landlord, who asks the Court to exercise a power which it is only entitled to exercise upon proof of the performance of the conditions, is in fact making a claim under the Act. The language does not seem to me to be inapt. I think it is fairly plain that in the opinion of the Legislature it was advisable that proceedings in respect to small houses,

C. A. 1925

RUSSOFF v. LIPOVITCH.

Atkin L.J.

which are generally let to poor people, should be taken in the county court rather than in the High Court, especially as there are certain applications which have to be made in connection with such proceedings the sole jurisdiction to deal with which is given to the county court. And even where the jurisdiction is not exclusively given to the county court, as for instance where the question is whether suitable alternative accommodation is offered by the landlord, the county court judge, who is presumably familiar with the conditions of the district, is better able to decide that question than a judge of the High Court.

The result appears to me to be that the Legislature intentionally increased the jurisdiction of the county court so as to allow of its dealing with all questions relating to the recovery of possession of houses to which the Rent Restrictions Act applies. It must be borne in mind that the maximum for the standard rent, which determines the application of the Act to the particular premises, is in the Metropolis 105*l.*, a figure which exceeds that of the ordinary statutory jurisdiction of the county court. And even where the standard rent is below 100*l.* a year, the rent actually payable by the tenant has in many cases risen, by reason of the permitted increases, to a sum far in excess of 100*l.* In those circumstances it appears to me very reasonable that the Legislature should have intended that the jurisdiction of the county court should increase along with the permitted increase of the rent, thereby still keeping the house within the jurisdiction of the county court so long as the Rent Restrictions Act applied to it.

I desire to add that I propose to reserve consideration of the question that arose in *Gunter* v. *Davis* (1), whether proceedings against a mere trespasser, who has never filled the position of tenant or sub-tenant, for the recovery of possession of a house to which the Act applies are proceedings arising out of the Act. On that question there is much to be said on both sides, but it does not arise here, and our judgment need not deal with it. In the present case, where the plaintiff

(1) Ante, p. 124.

has admittedly got to show that he has satisfied one of the conditions of s. 5, sub-s. 1, and also that it is reasonable to make the order, I think that the claim is one "arising out of this Act" and that the county court judge has consequently got jurisdiction. In my opinion the Master was right in remitting the case, and the learned judge was wrong.

C. A. 1925

RUSSOFF v. LIPOVITCH.

Atkin L.J

Appeal allowed.

Solicitor for the appellant: *Albin L. Hunt.*
Solicitors for the respondents: *Palmer & Robinson.*

J. F. C.

THE KING *v.* POWELL.
Ex parte THE MARQUIS OF CAMDEN.

1925 *Jan.* 23.

Landlord and Tenant—Agricultural Holding—Questions and Differences—Reference to Arbitration—Termination of Tenancy—Question arising out of—Notice to quit by Landlord—Withdrawal—Prohibition—Agricultural Holdings Act, 1923 (13 & 14 *Geo.* 5, *c.* 9), *s.* 16, *sub-s.* 1; *s.* 54.

In the Agricultural Holdings Act, 1923, s. 16, sub-s. 1, which specifies the various kinds of question, difference, or claim to be determined by arbitration under the Act, the words "arising out of the termination of the tenancy of the holding" apply to a question, difference, or claim of any of the kinds previously mentioned in the sub-section, and, consequently, no question, difference, or claim of any of these kinds can arise for determination by arbitration under the Act until after the termination of the tenancy.

The landlord of an agricultural holding gave to the tenant a notice to quit on a certain day. The landlord alleged that before that day the notice to quit was withdrawn by mutual consent. The tenant denied that he ever consented to a withdrawal of the notice to quit, and continued to occupy the holding after that day. Subsequently, on the application of the tenant the Minister of Agriculture and Fisheries appointed an arbitrator to determine in accordance with the Agricultural Holdings Act, 1923, the following claims, questions or differences between the parties—namely, (1.) whether the tenancy had been determined by the notice to quit; (2.) whether the tenant was entitled to compensation for disturbance, and, if so, the amount thereof; and (3.) the amount of the compensation to the tenant for improvements and certain other matters:—

Held, that questions such as these were not questions which under s. 16, sub-s. 1, of the Act should be determined by arbitration in

1925

REX v. POWELL. CAMDEN (MARQUIS), *Ex parte.*

accordance with the Act, unless they were questions "arising out of the termination of the tenancy"; that inasmuch as it did not appear that the tenancy had been terminated by the notice to quit or otherwise, these questions could not be said to arise out of the termination of the tenancy, and consequently that the arbitrator should be prohibited from proceeding with the arbitration.

Simpson v. *Batey* [1924] 2 K. B. 666, observations applied.

ORDER NISI for a writ of prohibition.

By an agreement made on September 12, 1922, the Marquis of Camden, as landlord, agreed to let, and Isaac Mannington, as tenant, agreed to take, a farm known as Great Shoesmith's Farm, Wadhurst, in the county of Sussex, from October 11, 1922, at a rent of 280*l.* a year, and the tenant agreed to pay the ingoing and to sign the estate agreement. During 1923 a dispute arose between the landlord's agent and the tenant as to the terms of the agreement to be signed by the tenant, and on September 24, 1923, the agent gave the tenant notice to quit on October 11, 1924. On October 15, 1923, the tenant wrote to the agent offering to sign the estate agreement, but refusing to sign a form of agreement that had been sent to him, and asking for the agent's reasons for giving him notice to quit. On October 30, 1923, the agent replied stating the reasons for giving notice to quit, and offering, as the tenant was willing to sign the estate agreement, to make certain alterations in the agreement previously sent to the tenant and, on that agreement so altered being signed by the tenant within fourteen days, to withdraw the notice to quit. On November 1, 1923, a letter was sent on behalf of the tenant, which the agent alleged, but which the tenant did not admit, amounted to an acceptance of all the terms of the previous letter. On November 13, 1923, a letter was sent on behalf of the tenant to the agent enclosing the agreement signed by the tenant. The tenant gave to the agent a notice dated August 30, 1924, of his intention to claim compensation for disturbance. On September 1, 1924, the agent wrote to the tenant that the notice to quit had been withdrawn. On September 25, 1924, a letter was sent on behalf of the tenant to the agent stating that the tenant insisted on the validity of the notice to quit and asking for a valuer to be appointed.

Though the tenant insisted that the notice to quit was valid and that on the date of the expiry thereof the tenancy had been determined, he did not quit the holding, and still remained in possession thereof during the proceedings hereafter mentioned. In October, 1924, application was made on behalf of the tenant to the Minister of Agriculture and Fisheries to appoint an arbitrator to determine the questions mentioned below.

On November 20, 1924, the Minister of Agriculture and Fisheries, in pursuance of the said application and in the exercise of his powers under the Agricultural Holdings Act, 1923, made an appointment of an arbitrator for the purpose of settling the claims, questions, or differences between the parties—namely, (1.) whether the tenancy had been determined by the notice to quit; (2.) whether the tenant was entitled to compensation for disturbance, and if so the amount thereof; and (3.) the amount of the compensation to the tenant in respect of (*a*) improvements, (*b*) hay and straw left on the holding, (*c*) cultivations, (*d*) breach of agreement to repair, (*e*) other tenant right.

On December 2, 1924, the landlord obtained an order nisi calling upon the said arbitrator to show cause why a writ of prohibition should not be awarded prohibiting him from proceeding with the arbitration on the grounds that (1.) the tenancy of the holding had not been determined by the notice to quit; and (2.) that the tenant had not quitted the holding as a consequence of the notice to quit or at all, and notice of the order nisi was given to the arbitrator and the tenant.

The tenant stated in an affidavit that he never agreed that on his signing the estate agreement the landlord should be entitled to withdraw the notice to quit; that he never assented to the withdrawal of the notice; that he signed the agreement because he had agreed to do so; that he did not thereby mean to assent to a withdrawal of the notice; that he signed the agreement because he could have been forced to do so by an action for specific performance; and that in fact he did not comply with the condition in the offer that he should sign the agreement within fourteen days, as the agent did not receive the signed agreement until November 14.

1925

REX v. POWELL. CAMDEN (MARQUIS), *Ex parte.*

J. G. Hurst K.C. and *A. J. Spencer* showed cause. The arbitrator should not be prohibited from proceeding with the arbitration on the grounds stated in the order nisi. He had jurisdiction to deal with the questions submitted to him.

The Agricultural Holdings Act, 1923, s. 16, sub-s. 1 (1), states the classes of question or difference which are to be determined by arbitration under the Act. The portion of the sub-section relevant to the present case, ending with the words "arising out of the termination of the tenancy of the holding," comprises several different classes of question or difference. On the true construction of that part of the sub-section the words "arising out of the termination of the tenancy of the holding" only apply to the last of these classes of question or difference—namely, "any other question or difference of any kind whatsoever between the landlord and the tenant," and do not apply to any of the previously mentioned classes of question or difference. The questions submitted to the arbitrator in the present case come within one or other of these earlier classes of question or difference.

Even if the words "arising out of the termination of the tenancy of the holding" apply to the determination by the arbitrator of all these classes of question or difference, it does not follow that the arbitration should not proceed. Each of the classes of question or difference except the last is a question or difference arising out of some "claim" by the tenant

(1) The Agricultural Holdings Act, 1923, s. 16, sub-s. 1, provides: "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act, or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant, or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy, and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."

against the landlord. A party may have a claim to relief during the tenancy, although it depends upon facts as to which there is a contest and cannot be determined until after the termination of the tenancy, and a question arising out of a claim of that kind may be submitted to arbitration under the Act before the termination of the tenancy. Here the tenant has undoubtedly claims giving rise to questions coming under some of these earlier classes of question even although the tenancy has not terminated, some of his claims being for sums alleged to be due for breaches of contract or otherwise in respect of the holding, and the questions to which these claims give rise may therefore be referred to arbitration, even if the tenancy has not yet terminated. As to the claim of the tenant that the tenancy has been determined by the notice to quit, the question arising out of that claim is one which does not go to the root of the arbitrator's jurisdiction, but with which he has power to deal, and which, being a question of fact, may be determined on the evidence. In the case of *Simpson* v. *Batey* (1) the question, which was held not to be within s. 16 as the tenancy had not been terminated, came within the class of question or difference immediately preceding the words "arising out of the termination of the tenancy," to which these words undoubtedly apply; and the decision implies that if these words do not apply to the earlier classes of question or difference, a claim giving rise to a question under one of these earlier classes does come within the section, even though the tenancy has not terminated. It is not disputed that before the arbitrator can make his award the tenancy must have terminated and the tenant must have quitted the holding.

[LORD HEWART C.J. Can a question arising out of a claim by the tenant for compensation under s. 12, sub-s. 1, or otherwise, be referred to arbitration before the termination of the tenancy?]

It would seem that it cannot.

For the purposes of the present case, however, it is immaterial to consider whether or not the words "arising out of the

(1) [1924] 2 K. B. 666.

1925

REX v. POWELL. CAMDEN (MARQUIS), *Ex parte.*

termination of the tenancy" apply to claims giving rise to all the previously mentioned classes of question or difference, because here the questions were not referred to the arbitrator until after the tenancy had been terminated by the landlord's notice to quit. A notice to quit can only be withdrawn by the mutual agreement or consent of the parties: *Tayleur* v. *Wildin* (1); and as here the tenant never consented to the withdrawal of the landlord's notice to quit it continued in operation and determined the tenancy. The fact that the tenant without the consent of the landlord continued to occupy the holding after the expiration of the notice to quit did not prevent the tenancy from being terminated by the notice to quit. If the tenant improperly continued in possession the landlord might have ejected him by action at law. It is not essential that a tenant whose tenancy has terminated should quit the holding before submitting claims for arbitration, provided he does so before the claims are determined. If the notice to quit was withdrawn, it may be that, as from its expiration, a new tenancy was created on the same terms.

Montgomery K.C. and *William Allen*, in support of the order nisi, were not called upon.

LORD HEWART C.J. In this case an order nisi has been obtained for a writ of prohibition to prevent an arbitrator from proceeding with an arbitration under the Agricultural Holdings Act, 1923, on the grounds that the tenancy of the holding in question had not been determined by a notice to quit by the landlord, and that the tenant had not quitted the holding in consequence of the notice to quit or at all.

The holding was let by the landlord to the tenant as from October 11, 1922. A notice to quit dated September 24, 1923, was given on behalf of the landlord requiring the tenant to deliver up possession on October 11, 1924. On November 20, 1924, the Minister of Health made an appointment of an arbitrator for the purpose of determining these three claims, questions or differences which are said to have arisen between

(1) (1868) L. R. 3 Ex. 303.

the landlord and the tenant—namely, (1.) whether the tenancy had been determined by the notice to quit; (2.) whether the tenant was entitled to compensation for disturbance and, if so, the amount thereof; and (3.) the amount of compensation to be paid to the tenant for improvements and certain other matters. It is conceded that the tenant had not at the time of the appointment of the arbitrator and has not even now quitted the holding in consequence of the notice to quit or at all, and that there is a controversy whether that notice to quit had or had not been withdrawn before it became effective. It cannot, therefore, be said that the tenancy of the holding has terminated.

The question is whether or not in these circumstances the arbitration should be allowed to proceed. The matters which may be referred to arbitration under the Act of 1923 are set out in s. 16, sub-s. 1. It is important to observe the scheme of this sub-section. [His Lordship read the sub-section, and continued:] When, in reading the sub-section, one arrives at the words, "any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding," it is apparent that the termination of the tenancy of the holding must precede and be the origin of that particular class of question or difference. Further, it has been conceded on behalf of the arbitrator that the class of question or difference mentioned in the opening words of the sub-section—namely, "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act"—is a question or difference arising on the termination of the tenancy. It is suggested, however, that as to the intervening classes of question or difference mentioned in the sub-section the words "arising out of the termination of the tenancy of the holding" have no application and may be omitted. That suggestion is made notwithstanding that the sub-section goes on to distinguish from the classes of question or difference already dealt with another class of question or difference arising "whether during the tenancy or on the termination thereof,"

1925

REX v. POWELL. CAMDEN (MARQUIS), *Ex parte.*

Lord Hewart C.J.

and notwithstanding that sub-s. 2 provides that any claim under the section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless the condition therein mentioned has been fulfilled before the expiration of that period. In view of these last-mentioned provisions of the section it would seem that the words in question should be taken to apply to all the classes of question or difference previously mentioned.

A somewhat similar, though I do not say the same, point has been considered by the Court of Appeal in the recent case of *Simpson* v. *Batey*. (1) In that case the tenants of a holding gave a notice to quit on a certain day, and when the day came they refused to give up possession, saying that the notice to quit had been waived. The landlord brought an action of ejectment. The tenants made an application to stay the action on the ground that the question between the parties was one which should be referred to arbitration under s. 16 of the Act of 1923, and that application was refused. In the course of his judgment Bankes L.J. said: "The words really relied on are 'or any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding.' Those words describe differences where it is not disputed that the tenancy has determined, and have no application where the question at issue is whether the tenancy has determined or not. Here the whole question is whether the tenancy has determined, and the case is not within the language of the section." In other words, as that class of question or difference is obviously referred to by the words "arising out of the termination of the tenancy of the holding," it does not include in advance or by anticipation claims which may arise or will arise after the tenancy has been, though as yet it has not been, determined, and has no application to claims of that kind. If, therefore, as the provisions of s. 16 itself seem to show is the case, the words "arising out of the termination of the tenancy of the holding" apply to all the preceding classes of question or difference, it follows that

(1) [1924] 2 K. B. 666, 669.

questions or differences of all the preceding classes arise only when it is not disputed that the tenancy has determined, and have no application where there is a dispute as to whether or not the tenancy has determined. That in my view is the true interpretation of sub-s. 1. It is not possible to draw a line between its first and fifth limbs on the one hand, and the intermediate limbs on the other hand, and to say that the former are limited by the termination of the tenancy, while the latter are not so limited. That view is confirmed not only by the other provisions of s. 16 to which I have referred, but also by s. 5, s. 12, sub-s. 1, and s. 54.

It therefore seems to me to be necessary that the tenancy of the holding should have terminated before such questions as these can arise, and it is not enough to say that there is a bona fide dispute whether the tenancy has been determined or not, especially where the tenant has not quitted the holding.

In connection with this case I may refer to the statement of Brett L.J. in *Reg.* v. *Local Government Board* (1): "I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." These words were uttered in the year 1882, but they are not of less force now.

In my opinion this order nisi should be made absolute.

AVORY J. I agree, for the reasons given, and I have nothing to add.

ACTON J. I agree. *Order absolute.*

Solicitors: *C. R. Sawyer & Withall, for John C. Buckwell, Brighton; Sharpe, Pritchard & Co., for W. C. Cripps, Son & Harries, Tunbridge Wells.*

(1) (1882) 10 Q. B. D. 309, 321.

J. R.

1925
Jan. 26.

KEY, APPELLANT *v.* BASTIN, RESPONDENT.

Criminal Law—Information—Printed Matter without Printer's Name and Address—Fiat of Attorney-General—Prosecution to be in Name of Law Officer of Crown—Condition precedent—Breach—Magistrates' Power to amend—2 & 3 Vict. c. 12, ss. 2 and 4—Newspapers Printers and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, and Second Schedule—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 1, 9.

By 2 & 3 Vict. c. 12, s. 2, confirmed by the Newspapers Printers and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), any person who prints any paper or book intended for publication on which the name and place of abode of the printer does not appear is liable to a fine; provided (s. 4) that it is not lawful to prosecute unless "in the name of H.M. Attorney-General or Solicitor-General," and if any prosecution takes place in the name of any other person the same is null and void.

The provision in the above section that the proceedings shall be in the name of the Attorney-General or Solicitor-General is a condition precedent, and if that condition is not fulfilled, the proceedings are null and void, and the Court has no jurisdiction to amend the defect.

CASE stated by Devon justices.

An information was preferred by the respondent, an inspector of police at Exmouth, against the appellant, Joseph Key, trading as Huxley & Co., of 71 Bridge Street, Cardiff, for that on July 1, 1914, at Exmouth, he did unlawfully publish a printed paper headed "The Huxley Company," relating to certain articles for sale, on which the name and place of abode of the printer did not appear, contrary to the Newspapers Printers and Reading Rooms Repeal Act, 1869. (1) The written fiat of the Attorney-

(1) The Newspapers Printers and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, provides: "The Acts and parts of Acts described in the first schedule to this Act are hereby repealed, but the provisions of the said Acts which are set out in the second schedule to this Act shall continue in force in the same manner as if they were enacted in the body of this Act. . . . ."

Among the Acts set out in the First Schedule is 2 & 3 Vict. c. 12, but the following sections of that Act are saved in the Second Schedule, namely:—

Sect. 2: "Every person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print . . . . his or her name and usual place of abode or business, and every person who shall publish or disperse . . . . any printed paper or book on which the name and place of

General authorizing the Director of Public Prosecutions to commence the proceedings was given on August 14, 1924. This fiat was forwarded by the Director of Public Prosecutions to the chief constable of Devon on the following day, with instructions to obtain process. An information was then sworn by the respondent and handed to the presiding magistrate at the police court, together with the Attorney-General's fiat, whereupon a summons was issued. The summons was heard at the police court, Exmouth, on September 15, 1924, and the appellant appeared and objected that the summons and information were not laid in the name of the Attorney-General as provided by 2 & 3 Vict. c. 12, s. 4, but in the name of John Bastin (as was in fact the case), and that they were therefore null and void. The justices overruled the objection and amended the information and summons by adding the words "on behalf of the Attorney-General" after the name of John Bastin. The appellant's counsel then took the further objection that there was no power to make any such amendment, and that it was void of effect. The justices overruled this objection, and convicted the appellant on the evidence. They then stated a case for the opinion of the Court, the only questions here material being (1.) whether the information was properly laid, and (2.) whether the justices had power to amend, and if so whether the amendment was valid.

Schiller K.C. and *Wethered* for the appellant. The information was not "in the name of the Attorney-General" and

abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than 5*l*."

Sect. 4: "Provided always, that it shall not be lawful for any person or persons whatsoever to commence, prosecute, enter, or file . . . . any . . . . information in any of Her Majesty's Courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine, penalty, or forfeiture made or incurred or which may hereafter be incurred under the provisions of this Act, unless the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General . . . . and if any . . . . information shall be commenced, prosecuted, or filed in the name or names of any other person . . . . the same and every proceeding thereupon had are hereby declared and the same shall be null and void to all intents and purposes."

1925

KEY v. BASTIN.

therefore it was null and void under 2 & 3 Vict. c. 12, s. 2, as re-enacted in the Newspapers Printers, &c., Repeal Act, 1869, Second Schedule: *Strickland* v. *Weldon*. (1)

The amendment was allowed by the Court after objection had been taken by the appellant and is therefore ineffective. The Summary Jurisdiction Act, 1848, gave the justices no power to amend the defect in the information and summons. For s. 1 of that Act does not permit amendments, and s. 9 only does so in cases of variance between the information itself and the evidence adduced. The provision in the Newspapers Printers, &c., Repeal Act, 1869, that proceedings should be "in the name of the Attorney-General" is a condition precedent to such proceedings, and if it is not fulfilled the Court has no jurisdiction to deal with the case.

Giveen for the respondent. The statute of 1869 does not require that the information should be brought actually "in the name of" the Attorney-General. The expression means no more than "with his sanction" or "on his behalf," which are the terms used in other similar statutes. The fiat of the Attorney-General was in fact here obtained and the information was brought by the respondent as agent for the Attorney-General. The justices had jurisdiction to hear the summons, overrule the objection, and allow an amendment in virtue of the Summary Jurisdiction Act, 1848, ss. 1, 9, and 10. Any defect was cured by the appellant appearing to the summons and remaining in Court after amendment was made. In *Boyce* v. *Paddington Borough Council* (2) the case was adjourned by consent of the Court in order that the consent by the Attorney-General might be given to the use of his name. A fortiori, in criminal proceedings, where the offence is a statutory breach, the Court has power to allow amendment of a technical mistake.

Schiller K.C. in reply.

LORD HEWART C.J. This case raises a point which has been described as technical. It is argued that the information

(1) (1885) 28 Ch. D. 426.

(2) [1903] 2 Ch. 556.

1925

KEY v. BASTIN.

Lord Hewart C.J.

upon which the proceedings were commenced failed to disclose upon its face that a condition precedent which was of fundamental importance had been fulfilled. The case turns on 2 & 3 Vict. c. 12, s. 4, re-enacted in Sch. II. of the Newspapers Printers and Reading Rooms Repeal Act, 1869. [His Lordship read the section and continued:] In other words it is laid down that any action or information, bill or plaint or any proceedings whatsoever are to be void ab initio, unless commenced in the name of a law officer of the Crown. It is common ground that the information in its original form did not refer in any way to the Attorney-General. Now this section was inserted for the protection of the appellant and other persons who might be in the position of defendant. What was the appellant to do when he saw that the information was only in the name of the police officer? He was surely entitled to say in the words of Pearson J. in *Strickland* v. *Weldon* (1): "The action is hopelessly bad on other grounds, and, for aught I know, if the case should go before the Attorney-General, he may in the exercise of his discretion, decline to issue his fiat, and the case may not come before the Court again."

It was conceded in argument that if the appellant had abstained from appearing, nothing could be done on the information as it then was. The authority given to the Attorney-General by the statute was to prosecute in his own name. In other statutes of the same kind prosecutions are authorized "with the sanction of" or "on the fiat of" the Attorney-General, but it is otherwise in this statute. The information was not here in the name of the Attorney-General, although, when application was made for the issue of a summons, the fact that the consent of the Attorney-General to the proceedings had been obtained was vouched, and the words "on behalf of the Attorney-General" were afterwards added to the respondent's name on the summons. The appellant appeared to the summons and took objection to the alleged defect; the justices then allowed the amendment and it is argued here for the respondent that they had

(1) 28 Ch. D. 426, 430.

1925

KEY v. BASTIN.

Lord Hewart C.J.

power to amend having regard to Jervis' Act, 1848, ss. 1 and 9. Sect. 1 is not concerned with the right of amendment and s. 9 deals with variances between an information and the evidence adduced in support. That is not the point of difficulty in this case, in which the question is whether a condition precedent has been fulfilled. The objection is not merely one of form, but that the information is a mere nullity and that no power can avail to turn it into a good information. It is quite a different matter from remedying a defect in an information which is otherwise good. In these circumstances I come to the conclusion, although with hesitation, that the objection is a valid one. It is important to remember that the section is for the protection of possible defendants, and that this defendant had no knowledge of what had passed between the Attorney-General, the Director of Public Prosecutions and others. He is entitled to say that the name of the Attorney-General did not appear on the information and that from the documents he received it appeared that this condition precedent was not fulfilled. It has been argued that the objection is a mere technicality, but it may be said that the section itself is a mere technicality, and for that reason defines carefully the conditions upon which proceedings may be brought. The condition here has not been fulfilled and the appeal will be allowed.

AVORY J. I come reluctantly to the same conclusion. There is no dispute that the proceedings were in fact commenced with the authority of the Attorney-General, but the appellant when he was served was entitled to know from the summons that the proceedings were both authorized and taken in the name of the Attorney-General. This was omitted both from the information and the summons, and the appellant was entitled to appear and take objection under 2 & 3 Vict. c. 12, s. 4, that the prosecution was null and void. Having so objected he was entitled to retire and the justices could then neither make any amendment nor proceed with the hearing. I do not think, in the face of the closing words of s. 4, that they had power to proceed

even if the appellant remained in Court during the proceedings either in person or by his representative. The objection is a good one and the appeal must be allowed.

1925

KEY v. BASTIN.

ACTON J. I agree.

Appeal allowed.

Solicitors for appellant: *Gibson & Weldon, for Barnett Janner, Cardiff.*

Solicitors for respondent: *Director of Public Prosecutions.*

F. P. F.

HEATON AND DUGARD, LIMITED *v.* CUTTING BROTHERS, LIMITED.

1925
Feb. 4.

PAIN, CLAIMANT.

[1924. H. 2425.]

Company—Debenture—Floating Security—Execution under Writ of fi. fa. against Company—Payment to Sheriff in Order to avoid Sale—Appointment of Receiver for Debenture Holders—Title to Money in Hands of Sheriff.

Judgment having been recovered in an action against a limited company, which had issued debentures giving a floating charge over its property, execution was issued under a writ of fi. fa., and the sheriff went into possession. In order to avoid a sale the company's managing director paid the judgment debt and costs, whereupon the sheriff withdrew. Thereafter, and before the sheriff paid the amount of the debt and costs to the execution creditors, the debenture holders in the defendant company appointed a receiver, who claimed to be entitled to the money in the hands of the sheriff:—

Held, that the money was paid to the sheriff as a debt owing by the defendants to the execution creditors, who were therefore entitled to retain it as against the receiver.

Robinson v. *Burnell's Vienna Bakery Co.* [1904] 2 K. B. 624 approved and applied.

APPEAL from Master Jelf.

The plaintiffs, having recovered judgment for a debt of 46*l.* 7*s.* 7*d.* and 10*l.* 11*s.* 6*d.* costs against the defendants, a limited company, issued a writ of fi. fa. on July 29, 1924,

1925

HEATON AND DUGARD, LD. v. CUTTING BROS., LD.

and on August 1 the sheriff levied execution, leaving a man in possession. On August 5 the defendants' managing director, in order to avoid a sale, paid the amount of the judgment debt and costs to the sheriff, who thereupon withdrew. The sheriff did not, however, pay over at once the amount to the plaintiffs, and on August 13 the money was still in his hands. On August 11 debenture holders, who had a floating charge on the assets of the defendants, made their security effective by the appointment of a receiver, who thereupon claimed the money in the hands of the sheriff. The sheriff interpleaded, and on the hearing of an interpleader issue the Master ordered that the money in question should be paid by the sheriff to the receiver for the debenture holders.

The plaintiffs, the execution creditors, appealed.

F. T. Atkins (*J. G. Hurst K.C.* with him) for the execution creditors. The Master was wrong in holding that the receiver for the debenture holders was entitled to the money paid to the sheriff by the judgment debtors. When that payment was made on August 5 the sheriff became a debtor to the execution creditors: *Morland* v. *Pellatt* (1); *Bower* v. *Hett* (2), who are unaffected by the subsequent appointment of the receiver. This case is governed by the decision of Channell J. in *Robinson* v. *Burnell's Vienna Bakery Co.* (3), where the facts were practically identical; and Channell J.'s view was approved by Vaughan Williams L.J. in *Evans* v. *Rival Granite Quarries.* (4)

W. T. Monckton for the receiver. Money seized by the sheriff does not thereby become the property of the execution creditors: per Maule J. in *Collingridge* v. *Paxton* (5); at all events until it is handed over by the sheriff. *Robinson* v. *Burnell's Vienna Bakery Co.* (3) is distinguishable, as in that case there was a bargain between the debtor and the sheriff,

(1) (1828) 8 B. & C. 722.
(2) [1895] 2 Q. B. 51, 56.
(3) [1904] 2 K. B. 624.
(4) [1910] 2 K. B. 979, 987.
(5) (1851) 11 C. B. 683, 688.

assented to by the execution creditor, to the effect that payments to the sheriff were to be treated as payments to the execution creditor. Where, as in this case, there is no such arrangement, money paid to the sheriff in order to avoid a sale and remaining in his hands is money in custodia legis, and can therefore be claimed by the receiver.

[He also cited *Wood* v. *Wood* (1) and *Taunton* v. *Warwickshire* (*Sheriff*). (2)]

Sandlands for the sheriff.

No reply was called for.

SALTER J. In this case, which has been well argued, the question is whether the order made by the Master is right. It is plain that he decided the matter under the misapprehension that the sum in question was cash which the sheriff had actually taken in execution, and on that footing he held that the receiver for the debenture holders was entitled to it. We now know that the money was not cash which the sheriff had taken in execution, but was money paid to him by the debtors in order to avoid a sale.

In the course of the argument various positions have been considered. It was said that where at the time the floating charge is made effective the sheriff is in possession of the chattels of the judgment debtor, but has not yet sold them, those chattels are in the custody of the law, and in those circumstances the receiver for the debenture holders has priority over the execution creditors. It was also said that where an execution has been levied by the actual seizure of cash, which was the case erroneously supposed to exist here, the money so seized, so long as it remains in the hands of the sheriff and is thus in the custody of the law, is subject to the rights of the receiver. Again it was said that where the sheriff seizes chattels and sells them, the proceeds of the sale, so long as they remain in his hands, are likewise subject to the rights of the receiver, and are not the money of the execution creditor. It is said to be undecided whether

(1) (1843) 3 G. & D. 532.

(2) [1895] 2 Ch. 319.

1925

HEATON AND DUGARD, LD. v. CUTTING BROS., LD.

Salter J.

money seized, or money which is the proceeds of goods seized and sold, may not be followed by the receiver, even after it has been paid over by the sheriff to the execution creditor. For the purposes of this case, however, it is unnecessary to express an opinion upon any of these cases. In my view this case is essentially different from those suggested. Here the debtor company had of course an implied licence from the debenture holders to carry on its ordinary business. The debt in question was a trade debt due to the judgment creditors. Under pressure of the execution, and to avoid a sale, the debtors paid their debt. They did not send the money direct to the judgment creditors, which it may be they might have done; they paid it to the sheriff in order that he might pay it over to the judgment creditors. In that way they paid their debt. In those circumstances I am quite unable to distinguish this case from *Robinson* v. *Burnell's Vienna Bakery Co.* (1) It was sought to distinguish that case from the present on the ground that there an arrangement was come to for the payment of the debt by instalments and for the holding over of the sale, while in the present case there was no such arrangement. I am unable to see that that fact makes any difference. In *Robinson* v. *Burnell's Vienna Bakery Co.* (1) the sheriff having entered, the judgment debtor, desiring to avoid a sale, but being unable to pay the judgment debt in full, arranged with the sheriff, with the concurrence of the creditor, to pay the debt by instalments, and that so long as the instalments were kept up the sale should not take place. Certain instalments were paid, and afterwards a receiver was appointed in a debenture holder's action. The receiver claimed to be entitled to the money paid by the company, which still remained in the sheriff's hands. Channell J. held that the money in the hands of the sheriff was the money of the execution creditor. That judgment has received the approval of Vaughan Williams L.J. in *Evans* v. *Rival Granite Quarries* (2), and I think it is directly in point in this

(1) [1904] 2 K. B. 624. (2) [1910] 2 K. B. 979, 987.

1925

HEATON AND DUGARD, LD. v. CUTTING BROS., LD.

case. For these reasons the appeal must succeed; and there will be an order that no action be brought against the sheriff.

FRASER J. I am of the same opinion.

Appeal allowed.

Solicitors for execution creditors: *Cochrane & Cripwell.*

Solicitors for receiver: *Torr & Co., for C. Douglas Coulby, Nottingham.*

Solicitors for sheriff: *Taylor, Jelf & Co.*

J. S. H.

JONES *v.* GEEN.

1925
Feb. 6.

Landlord and Tenant—Covenant by Tenant to keep Premises in good and tenantable Repair (fair Wear and Tear excepted)—House within Housing of the Working Classes Acts—Implied Undertaking by Landlord to keep House in all Respects fit for human Habitation—Liability of Landlord to do the Whole or Part of the Repairs—Notice of Increase of Rent—Validity—Housing of the Working Classes Act, 1890 (53 *&* 54 *Vict. c.* 70), *s.* 75—*Housing of the Working Classes Act,* 1903 (3 *Edw.* 7, *c.* 39), *s.* 12—*Housing, Town Planning, &c., Act,* 1909 (9 *Edw.* 7, *c.* 44), *ss.* 14, 15, 76—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*d*).

A dwelling-house which as regards rent was within the Housing of the Working Classes Acts as well as the Rent Restriction Acts, was let to a tenant under an agreement by which he agreed "to keep and leave the said premises and fixtures in good and tenantable repair, state and condition (fair wear and tear only excepted)." By the Housing of the Working Classes Acts an undertaking was implied in the contract of letting that the house should during the holding be kept by the landlords in all respects reasonably fit for human habitation. The landlords served three notices of increase of rent upon the tenant under s. 2, sub-s. 1 (*d*), of the Increase of Rent, &c. (Restrictions), Act, 1920, in all of which they claimed an increase of 25 per cent. upon the basis that the landlords were responsible for the whole of the repairs. The tenant paid the increases demanded, and subsequently claimed to recover rent overpaid on the basis that the notices of increase were invalid, as the landlords were not responsible for the whole of the repairs:—

Held, that the standard of repair required by the tenant's covenant to keep and leave the premises and fixtures in good and tenantable repair (fair wear and tear only excepted) was higher than the standard of

1925

JONES v. GEEN.

repair imposed on the landlords by the Housing of the Working Classes Acts, and therefore that the clause in the tenancy agreement was not void and the landlords were not responsible for the whole of the repairs.

APPEAL from Lambeth County Court.

By an agreement dated August 24, 1915, the defendants, Philip and George Geen & Co., let to the plaintiff the messuage or tenement, No. 13 Trigon Road, Lambeth, in the county of London, for one year at the rent of 2*l.* 16*s.* 8*d.* per month. The tenant agreed to pay all rates, taxes, duties, and assessments whatsoever (landlord's property tax only excepted). The tenant was to have the use and enjoyment of the several fixtures and fittings in and about the premises. The tenant further agreed "to keep and leave the said premises and fixtures in good and tenantable repair, state, and condition (fair wear and tear only excepted)."

The landlords served upon the tenant on September 13, 1920, July 28, 1921, and February 17, 1922, three notices of increase of rent. By each of these notices the landlords claimed (inter alia) an increase of twenty-five per cent. under s. 2, sub-s. 1 (*d*) (i.), of the Increase of Rent, &c. (Restrictions), Act, 1920, on the basis that the landlords were responsible for the whole of the repairs. The tenant paid the increases demanded.

The tenant in January, 1924, commenced an action in Lambeth County Court to recover the sum of 43*l.* 10*s.* 8*d.* as rent overpaid, on the basis that all the notices of increase of rent were invalid.

The tenant urged before the county court judge (inter alia) that as under his agreement of tenancy he was under a liability "to keep and leave the premises and fixtures in good and tenantable repair (fair wear and tear only excepted)," the landlords were not responsible for the whole of the repairs, and the landlords were only entitled under s. 2, sub-s. 1 (*d*) (ii.), of the Rent Restriction Act, 1920, to such lesser amount than 25 per cent. as might be ascertained by agreement between the parties or be determined by the county court judge to be fair and reasonable, having regard to such liability, and that

1925

JONES v. GEEN.

as that amount had not been agreed or determined by the county court the notices of increases were bad.

The county court judge held that under the clause in the tenancy agreement there was and could be no liability on the tenant to repair which was assessable. He also decided the other points raised against the tenant and held that the notices of increase were in fact served and were valid notices. But inasmuch as on the taking of an account it appeared that owing to an error there had been slight overpayment the county court judge gave judgment for the tenant for 4*l.* 7*s.* 4*d.*

The tenant appealed.

Wickham for the tenant. By the agreement the tenant is under an express liability to keep the house in good and tenantable repair (fair wear and tear excepted), and therefore the landlords are not responsible for the whole of the repairs, so as to entitle them to increase the rent by 25 per cent. under s. 2, sub-s. 1 (*d*) (i.), of the Rent Restriction Act, 1920. Where a landlord is responsible for only part of the repairs he is not entitled to serve a notice of increase of rent under s. 2, sub-s. 1 (*d*) (ii.), until the amount of such increase has been either agreed between the parties or determined by the county court to be fair and reasonable: *Bourne* v. *Litton*. (1) As the amount of increase has not been determined by the county court none of the notices of increase were valid notices. The county court judge was wrong in holding that there was no liability on the tenant to repair which was assessable. It was held in *Proudfoot* v. *Hart* (2) that a tenant under an agreement to keep a house in good tenantable repair was liable for permissive waste, as well as for commissive waste, but that he need not renew what was worn out. In *Citron* v. *Cohen* (3) the tenant was bound by his agreement to keep and deliver up the premises in good and tenantable repair, "reasonable wear and tear excepted," and it was nevertheless admitted that the tenant was liable to do certain repairs under his covenant. It was held in *Manchester Bonded Warehouse*

(1) [1924] 1 K. B. 231; 2 K. B. 10. (2) (1890) 25 Q. B. D. 42.
(3) (1920) 36 Times L. R. 560.

1925

JONES v. GEEN.

Co. v. *Carr* (1) that " reasonable wear and tear " did not include total destruction of the demised premises by a catastrophe which was never contemplated by either party, such as the destruction of the demised premises by fire. In *Terrell* v. *Murray* (2) it was held that the words " reasonable wear and tear excepted " excluded dilapidations caused by the friction of the air, by exposure and by ordinary use.

[*Scales* v. *Lawrence* (3) was also cited.]

Merriman K.C. and *C. T. Williams* for the landlords. The covenant by the tenant in the agreement to keep and leave the premises in good and tenantable repair cannot make the tenant liable for repairs, inasmuch as the landlords are by statute liable to keep the demised premises in repair. The imposition of that statutory liability makes it impossible to give effect to the covenant. " Good tenantable repair " was defined in *Proudfoot* v. *Hart* (4) as " such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." Under s. 2, sub-s. 5, of the Rent Restriction Act, 1920, the landlord is deemed to be responsible for any repairs for which the tenant is under no express liability. The landlord in this case would therefore be liable for fair wear and tear, as that is excepted from the tenant's liability. As the rent of this house was only 2*l.* 16*s.* 8*d.* per month it came within the provisions of the Housing of the Working Classes Acts. Sect. 75 of the Housing of the Working Classes Act, 1890, provides that " in any contract . . . . for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation." Sect. 12 of the Housing of the Working Classes Act, 1903, provides that s. 75 of the Act of 1890 " shall, as respects any contract made after the passing of this Act, take effect notwithstanding any agreement to the contrary, and any such agreement made after the passing of this Act

(1) (1880) 5 C. P. D. 507, 513.
(2) (1901) 17 Times L. R. 570.
(3) (1860) 2 F. & F. 289.
(4) 25 Q. B. D. 52, 55.

shall be void." Sect. 76, sub-s. 1, of the Housing, Town Planning, &c., Act, 1909, provides that "Part I. of this Act shall be construed as one with the Housing of the Working Classes Acts, 1890 to 1903, and that Part of this Act and those Acts may be cited together as the Housing of the Working Classes Acts, 1890 to 1909." Part I. of the Act of 1909, which is headed, "Housing of the Working Classes," includes ss. 14 and 15. Sect. 14 provides that "In any contract made after the passing of this Act for letting for habitation a house or a part of a house at a rent not exceeding—(*a*) in the case of a house situate in the administrative county of London, forty pounds . . . . there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. . . . ." Sect. 15, sub-s. 1, provides that "The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation." Under sub-s. 2 the landlord or the local authority may enter and view the state of the premises. Under sub-s. 3, if the undertaking implied by s. 15 is not complied with the local authority may require the landlord by a written notice to do such works as are specified in the notice as being necessary to make the house in all respects reasonably fit for human habitation. Sect. 47, sub-s. 1, also provides that "any provisions of this Act which supersede or amend any provisions of the principal Act shall be deemed to be part of that Part of the principal Act in which the provisions superseded or amended are contained." The Acts are to be construed as one. It is therefore clear that s. 14 of the Act of 1909 either amends or supersedes s. 75 of the principal Act, and that s. 15 of the Act of 1909 extends and amends s. 14, and that they are both to be read as part of the Act of 1890. The contract implied by the Acts is by s. 12 of the Act of 1903 to take effect notwithstanding any agreement to the contrary, and any agreement to the contrary is declared to be void. It is clear by reference to s. 53, sub-s. 10, of the Act of 1909 that

1925

JONES v. GEEN.

s. 12 of the Act of 1903 operates to make any agreement contrary to the contract implied by s. 15 of the Act of 1909 void. The liability of the landlords under the Housing of the Working Classes Acts and the covenant by the tenant to repair cannot stand together; it is an agreement to the contrary, and therefore void by s. 12 of the Act of 1903: see Foà on Landlord and Tenant, 6th ed., p. 172.

[SALTER J. Is the standard of liability under the Acts the same as under the agreement?]

It is impossible to split up the tenant's covenant as it is in respect of the same subject matter as the landlords' liability under the statutes, although possibly to a different degree. The tenant cannot be held liable under his covenant for some repairs which do not come within the landlords' obligation to keep the house in all respects reasonably fit for human habitation. If the tenant's covenant were divided that would imply a liability on the tenant which is not in the agreement contrary to s. 2, sub-s. 5, of the Rent Restriction Act, 1920.

Wickham in reply. The expression "working class" is defined in the Schedule to the Act of 1903 as including "mechanics, artisans, labourers and others working for wages." A house cannot be deemed to be let for habitation by persons of the working classes unless it is let to a member of the working classes. There is no evidence that the tenant is a member of the working classes. The liability of the tenant under his covenant and the liability of the landlords under the Housing of the Working Classes Acts do not stand on the same basis. The landlords are bound to put the house in a state fit for human habitation, whereas the tenant's obligations could be fulfilled by the payment of money.

SALTER J. This appeal raises what is, so far as I know, a novel point, involving the effect of the Housing of the Working Classes Acts upon s. 2, sub-s. 1 (*d*), of the Increase of Rent, &c. (Restrictions), Act, 1920, in cases where the rent of the house is small enough to bring the letting within the first named statutes. The proceedings were taken by the tenant against the landlords to recover rent alleged to have been overpaid. The landlords

had served certain notices of increase under s. 2, sub-s. 1 (*d*), of the Act of 1920, claiming an increase of 25 per cent. in respect of repairs, and the tenant had paid certain amounts on account of the rent thus increased, and he claimed to recover sums overpaid. The question was whether the landlords had the right to make the increases which they had made. There was a dispute whether all the necessary notices had been served, and the county court judge was satisfied that they had been served, and I am clearly of opinion that there was evidence upon which he could so find. The question therefore which the county court judge had to determine was whether this was a case under s. 2, sub-s. 1 (*d*) (i.), where the landlords are responsible for the whole of the repairs, or whether it was a case under s. 2, sub-s. 1 (*d*) (ii.), where the landlords are responsible for part, but not the whole, of the repairs. The county court judge came to the conclusion that it was a case under sub-s. 1 (*d*) (i.), where the landlords are responsible for the whole of the repairs, and he made an order accordingly. It is not necessary to go into small matters of calculation; admittedly the question is whether the county court judge was right or wrong in that view. If he was wrong in that view his decision cannot stand.

The question whether a landlord is responsible, which means responsible under the agreement of tenancy, to the tenant for the whole of the repairs, or for part and not the whole of the repairs, must depend upon the agreement between the parties. It may be that the law requires us to read certain matters into this agreement of tenancy which the parties did not put there, and perhaps to strike something out of the agreement which the parties have put there, but obviously one must begin by looking at the agreement between the parties. In this case the agreement is in writing, and is dated August 24, 1915. Under it the landlords agreed to let and the tenant agreed to take the premises in question for the term of one year at a rent of 2*l.* 16*s.* 8*d.* a month. The tenant undertakes "to keep and leave the said premises and fixtures in good and tenantable repair, state and condition (fair wear and tear only excepted)," and there are other

1925

JONES v. GEEN.

Salter J.

tenants' covenants. That is the agreement as the parties made it, and if that agreement stands as they made it unmodified by statute Mr. Merriman does not argue, and no one could argue, that it is a case in which the landlords are responsible for the whole of the repairs. We therefore have to see whether that agreement must be read as having been modified by statutes, and we are referred to the Housing of the Working Classes Acts. The rent of this house is low enough to bring it within those statutes, which are the Housing of the Working Classes Act, 1890, the Housing of the Working Classes Act, 1903, and the First Part of the Housing, Town Planning, &c., Act, 1909. The Act of 1890, which is the principal Act, provides in s. 75 as follows: "In any contract made after" August 14, 1885, "for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation." It was urged upon us that there was no evidence here that this tenant was a person who belonged to the working classes, and that in the Act of 1903 there is a definition of persons who belong to that class. I think that definition is given for purposes other than questions of repair between landlord and tenant. In my opinion, no such question arises here, because s. 75 continues: "In this section the expression 'letting for habitation by persons of the working classes' means the letting for habitation of a house or part of a house at a rent not exceeding" a certain sum. I think therefore the position or the occupation of the tenant does not for this purpose matter, provided the rent of the house is sufficiently small to bring it within the Acts. Therefore we have to write into this contract, as though the parties had put it there, a covenant by the landlords that the demised premises are at the commencement of the tenancy in all respects reasonably fit for human habitation. Then we come to the Act of 1903, s. 12 of which provides: "Sect. 75 of the principal Act (which relates to the condition to be implied on letting houses for the working classes) shall, as respects any

contract made after the passing of this Act, take effect notwithstanding any agreement to the contrary, and any such agreement made after the passing of this Act shall be void." The effect of that provision is that the covenant on the part of the landlords to which I have referred is to be written into this agreement, notwithstanding the tenant's promise to do certain repairs, and that any agreement made after the passing of this Act (the present agreement was so made) which is an agreement to the contrary shall be void. I shall have to consider directly whether and how far the tenant's covenant to repair in this agreement is an agreement to the contrary. It may be urged that an agreement to the contrary when the Act was passed means only an agreement to the contrary with regard to the landlord's undertaking as to the state of the premises at the date of the commencement of the tenancy. The last statute to be considered is the First Part of the Housing, Town Planning, &c., Act, 1909, ss. 14 and 15. Sect. 14 says: "In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding"—in this case a rent which brings this house within the statute—"there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. . . . ." Sect. 15, sub-s. 1, says: "The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation." If we stop there it seems to be clear that to comply with these three statutes we must begin by writing into this agreement, first the undertaking by the landlords as to the condition of the premises at the commencement of the tenancy to which I have referred already, and next a promise by the landlords that the house shall during the holding be kept by them in all respects reasonably fit for human habitation. Those are the additions which have to be made to the agreement of the parties, and it must be read as though they had themselves inserted them.

1925

JONES v. GEEN.

Salter J.

Then comes the question whether any part of this agreement is to be struck out. I agree with the argument of Mr. Merriman that any term of this agreement which is, in the words of the Act, "an agreement to the contrary," that is to say which conflicts with the statutory duties imposed upon the landlords, it may be more correct to say with the statutory covenants which it exacts from them, must be regarded as void. We come then to the point which I think is the difficulty in this case. How are we to read this agreement in view of the tenant's express covenant to do a considerable amount of repair, "to keep and leave the premises and fixtures in good and tenantable repair, state, and condition, fair wear and tear only excepted"? If that clause is to be struck out altogether, then the only express agreement between the parties will be the landlords' covenant as to the state of the premises at the commencement of the holding, and his covenant to keep them during the holding in all respects reasonably fit for human habitation, and since there is no other express covenant relating to repair, the landlords under s. 2, sub-s. 5, of the Rent Restriction Act, 1920, would be liable for repair. Therefore it would be a case where the landlords are responsible for the whole of the repairs and the decision appealed from would be right. In my opinion, however, this clause ought not to be treated in this case as wholly deleted. I think that there is a marked difference between the state of repair which is defined by the words "in all respects fit for human habitation" and by such a phrase as "good and tenantable repair, fair wear and tear only excepted." The Housing of the Working Classes Acts and the Rent Restriction Acts are legislation of very different character, and aimed at very different evils. The Housing of the Working Classes Acts and the Housing, Town Planning, &c., Act are directed against slums, overcrowding and buildings in which people are herded together in conditions unsuitable for human habitation; and the standard of repair required by those Acts is naturally for those purposes a humble standard. It is only required that the place must be decently fit for human beings to live in. On the other hand, I

think that the standard of repair which is implied by such words as "keeping premises in good and tenantable repair, state, and condition, fair wear and tear only excepted," is something very much higher than to make them decently habitable by human beings. It implies a standard of comfort and repair a great deal higher than the standard which is required by the Housing of the Working Classes Acts. I think that those two standards ought to be kept in mind, because the Rent Restriction Acts were passed to remedy quite a different evil. They were passed to deal with the shortage of houses, to prevent unjust evictions and the social evils which would follow therefrom, and the Rent Restriction Acts apply to and affect very much larger classes, classes who are very much better off than those who are concerned with the Housing of the Working Classes Acts.

I think therefore that we ought to endeavour to give effect to the distinction between those two standards of repair. I think that this clause must be regarded as void in so far as it takes from the landlords and puts upon the tenant the duty of doing such repairs as are necessary to keep the premises in all respects reasonably fit for human habitation, but as being valid, as imposing upon the tenant all repairs above that standard which are necessary to keep the premises in good and tenantable repair, state and condition, fair wear and tear only excepted. In my opinion, there is a great deal of repair which under such a reading will fall upon the tenant and not upon the landlords. I think that if the premises get into such a state of disrepair that they are not fit for human habitation the landlord could be forced by the tenant to put them into a state fit for human habitation, and then the landlord can force the tenant to do such further repairs as are necessary to put them in good and tenantable repair.

For these reasons I think this is not a case where the landlords are responsible for the whole of the repairs, and therefore the decision of the county court judge cannot stand. The question then arises, what ought to be done? We ought not to send this case to the county court judge without expressing

1925

JONES v. GEEN.

Salter J.

our view of the proper course to take. This is not the only case in which the Increase of Rent, &c. (Restrictions), Acts, impose on the county court judge a very difficult, if not an almost impossible task, but the Act assumes that it is possible in every case where the landlord is responsible to the tenant for part of the repairs, and the tenant is responsible to the landlord for other part of the repairs, for the county court judge to make a determination of what is a fair and reasonable increase of the rent to be allowed to the landlord in respect of those repairs for which he is responsible to the tenant. This heavy task is placed on the county court judge, but that is the fault of the statute and not the fault of this Court. The matter must go down to the county court judge to determine as best he can, in the light of what has been said here, what is the fair and reasonable amount of addition to the rent which the landlords are to be allowed to make.

FRASER J. I agree.

Appeal allowed.

Solicitors for tenant: *Nimmo & Harvey.*
Solicitors for landlords: *Powell, Burt & Lamaison.*

R. F. S.

ILFORD URBAN DISTRICT COUNCIL *v.* BEAL AND JUDD.

1925
Feb. 3, 4, 12.

Local Government—Sewer—Acts done by Landowner—Damage to Sewer lying beneath Land—Landowner Ignorant of Existence of Sewer—Liability.

An owner of land is not liable for damage to a sewer lying beneath his land, caused by acts done or omitted by him upon the land, where he did not know, and could not reasonably be expected to know, of the existence of the sewer.

Humphries v. *Cousins* (1877) 2 C. P. D. 239 considered.

Action tried by Branson J. without a jury.

The action was brought by the plaintiffs in respect of damage done to one of their main sewers. At the close of the evidence for the plaintiffs, the learned judge held that there was no case against the defendant Beal, and the action proceeded against the other defendant, Mrs. Judd.

The following statement of facts is taken from the judgment of Branson J. :—

In 1900/1901 the plaintiffs laid the sewer in question, which in part of its course passed under the River Roding and under premises known as No. 1 High Road, Ilford, which include land abutting on the river. Those premises were, at that time, owned by Mrs. Frances Beal, who died on August 20, 1905, and left them to her husband Edmund Beal. On June 29, 1918, Edmund Beal conveyed the premises to the defendant Mrs. Judd. The usual requisitions upon title were made by Mrs. Judd's solicitors, and the answers did not disclose the existence of the sewer on the premises. I am satisfied that neither Mrs. Judd nor any of her servants or agents were aware of the existence of the sewer. When the sewer was laid Mrs. Beal claimed compensation in respect of its compulsory passage through her land, and as the result of an arbitration was awarded and was paid 80*l.*

In 1902 the authorities concerned decided upon certain improvements in the locality, which resulted in the rebuilding and widening of Ilford Bridge, which abutted on the property of Mrs. Beal, and the diversion of the Aldersbrook, a tributary of the Roding, which had hitherto joined the Roding at a

1925

ILFORD URBAN COUNCIL v. BEAL.

point just below Mrs. Beal's property, and was then made to join it just above that property. In July, 1903, Mrs. Beal received as compensation from the Essex County Council, who carried out these alterations, 200*l.* in respect of the diversion of the Aldersbrook and 500*l.* in respect of the alteration of the bridge.

In 1903 there came an unusually severe flood, which swept away an old retaining wall which had previously stood between the garden of No. 1 and the river, and in 1904 a new retaining wall was erected by Mrs. Beal a few feet on the landward side of the old wall and across the plaintiffs' sewer. The new wall was a concrete wall built on the advice of a competent surveyor who, however, was not a civil engineer. It was not carried as far below the bed of the river as the best engineering practice would dictate, and it lacked a concrete toe or apron, the provision of which would have prevented the river from undermining the wall as soon as it was in fact undermined, and it lacked weeping holes to drain off water which might get behind it, either from the river or from rain. In spite, however, of these deficiencies the wall stood until September, 1919, and down to that time did not present to any one who saw it any definite indications that it was in danger of collapsing. The plaintiffs' engineer, Mr. Shaw, knew of the existence of the wall and that it passed over the plaintiffs' sewer. It could easily be seen from the Ilford Bridge, against which it abutted, and the engineer must have seen it from time to time, but it never occurred to him that it was likely to damage the sewer.

On September 17, 1919, trouble at the plaintiffs' pumping station indicated that the sewer was broken, and steps were taken to find out where the break had occurred. The information at the disposal of the plaintiffs' engineer did not enable him to locate the sewer in the first instance, and it was at first looked for at a spot some distance away from that which it in fact occupied. When it was discovered and the ground above it opened up it was found that the river had completely undermined the concrete wall, which had moved

forward a foot or two from its original position under the thrust of the wet earth behind it and also leant forward a little, so that its outer bottom corner had pressed upon the sewer which crossed diagonally beneath it and had broken in the cast-iron pipe of which the sewer consisted, and had penetrated it to the extent of some $6\frac{1}{2}$ inches.

Montgomery K.C. and *Tindal Atkinson* for the plaintiffs.

Craig Henderson K.C. and *Ridsdale* for the defendant Beal.

Rayner Goddard K.C. and *J. Ewart Walker* for the defendant Mrs. Judd.

Cur. adv. vult.

Feb. 12, 1925. BRANSON J. read the following judgment: This is an action by the plaintiffs, in whom are vested the main sewers in the urban district of Ilford, for damage done to the Ilford main Roding sewer. There were originally two defendants, but at the close of the plaintiffs' case I held that there was no case made against the defendant Beal, and with him therefore I have nothing more to do. The other defendant is Mrs. Judd, and the issue which I have to determine is whether or no she is liable to make good to the plaintiffs the damage which has been sustained by their sewer. If so, the question as to the amount of such damage will be settled elsewhere. [The learned judge stated the facts and continued:] It is contended for the plaintiffs that in these circumstances the defendant Judd is liable to the plaintiffs to make good the damage to the sewer. In the statement of claim the case is put first upon negligence in maintaining the wall in an improper condition, but in his argument to me Mr. Montgomery did not rely upon negligence of the defendant as giving him any cause of action in the circumstances of this case, and consequently I say no more about that view of the case.

The next alternative pleaded was that the wall was a nuisance maintained by the defendant upon the premises. Mr. Montgomery did not put his case strictly upon nuisance,

1925

ILFORD URBAN COUNCIL v. BEAL.

Branson J.

but as an action upon the case. The plaintiffs' sewer, he says, was lawfully upon the defendant's property, and has there been injured by the moving of the defendant's wall, and that is enough to establish the defendant's liability, unless the defendant can show that the movement was caused by the act of God or the interference of a third person, and that the injury to the sewer was done before the defendant had reasonable opportunity of discovering and stopping the movement so caused. The problem may, I think, in the circumstances of the present case, be stated as follows. It being conceded that if the plaintiffs' sewer had been laid on the surface of the defendant's land the defendant would have been bound to take care that her wall was not allowed to fall upon it or move against it so as to inflict damage upon it, does the fact that it was buried eight or nine feet deep, and that she had not discovered, and could not, by the exercise of any reasonable care, have discovered its existence or whereabouts, make any difference to her liability? The law certainly imposes upon an occupier of land a very serious burden if he has at his peril to ensure that nothing done or omitted by him upon his land shall injure something buried beneath it, of which he did not know, and could not reasonably be expected to know, and I am not prepared to hold that such is the law, unless there is authority which compels me to do so.

To my mind, however, the weight of authority is to the contrary of this proposition. The contention for the plaintiffs before me is the same as that of the plaintiff in *Barker* v. *Herbert* (1), with the minimum amount of modification rendered necessary by the decision of the Court of Appeal in that case. There the defendant had an area abutting on the highway. He had properly fenced it, but some boys playing football had broken the railing, and the plaintiff, a child, fell into the area and was hurt. The jury found that at the time of the accident the area was a nuisance, but that the defendant did not know, and could not by the exercise of reasonable diligence have known, of it before the accident happened.

(1) [1911] 2 K. B. 633, 636, 637, 645.

Vaughan Williams L.J. laid down the law as follows: "In my opinion there is no such absolute responsibility as that contended for imposed upon a person who has property adjoining a highway, even although a portion of that property may be an area which, if unprotected by a fence or railing of some sort, would constitute a danger to those using the highway. In my judgment there can be no liability on the part of the possessor of land in such a case, unless it is shown either that he himself or some person for whose action he is responsible, created that danger which constitutes a nuisance to the highway, or that he has neglected for an undue time after he became, or, if he has used reasonable care ought to have become, aware of it, to abate or prevent the danger or nuisance." Farwell L.J. draws the distinction between the absolute duty owed to others by one who is making an abnormal use of land: *Nichols* v. *Marsland* (1) and *Rylands* v. *Fletcher* (2), and that owed by those whose use of land is merely normal. There can be no question that in the present case the use of the land by erecting a retaining wall upon it is a merely normal use, and the principle illustrated by such cases as *Nichols* v. *Marsland* (1) and *Rylands* v. *Fletcher* (2) can have no application to it. But it is contended that *Barker* v. *Herbert* (3) was decided as it was, not because the defendant did not know and could not by the exercise of reasonable diligence have found out the danger in time to remedy it, but because the danger arose from the act of a third party; and there was no intervention of a third party in the present case. In my view this contention is unsound. It was the absence of knowledge in the defendant, an absence of knowledge not due to any neglect of duty, which was the ratio decidendi of the Court of Appeal. I think this appears clearly from the judgments delivered, and especially from the language used by Fletcher Moulton L.J. and by Farwell L.J. And this view is confirmed, in my opinion, by a consideration of the earlier authorities.

It is said in Comyns' Digest (Action upon the case for

(1) (1875) L. R. 10 Ex. 255.
(2) (1868) L. R. 3 H. L. 330.
(3) [1911] 2 K. B. 633, 636, 637, 643, 645.

1925

ILFORD URBAN COUNCIL v. BEAL.

Branson J.

misfeasance (B)) that an action upon the case does not lie where a man has not sufficient notice of his duty. The authority cited by Comyns in support of his statement is 2 Inst. 130, where it is laid down that no action will lie against a sheriff by a juror whom he has returned, notwithstanding that the juror showed him a charter of exemption, unless the juror had also shown him his writ de allocando, for the sheriff cannot make a judgment of the validity of the charter, and therefore had not sufficient notice that the juror was exempt.

That case is somewhat remote from the present, but the principle stated by Comyns receives support from the judgment of Blackburn J. (as he then was) in *Tarry* v. *Ashton*. (1) That action arose out of the fall of a heavy lamp, which projected over a public highway from premises in the occupation of the defendant. The learned judge, whilst laying down the law to be that if the defendant either knew that the lamp was defective or omitted to discharge the duty of inspecting it from time to time, a duty which arose from his knowledge that in the nature of things the lamp must in course of time get out of order and become a danger, he would be liable, continues: "If he did investigate and there were a latent defect which he could not discover, I doubt whether he would be liable." Mr. Justice Blackburn's judgment in *Tarry* v. *Ashton* (1) was approved by Farwell L.J. in *Barker* v. *Herbert*. (2) Each of the last two cases cited was one in which the defendant had knowledge of a danger to be guarded against. In the one he had an area adjoining a highway which he knew would be a nuisance if left unfenced or allowed to become unfenced. In the other the defendant had erected over the highway a heavy lamp, which must in time become a danger if left without proper attention. Yet in the one case it was held, and in the other suggested, that lack of knowledge not due to default prevented liability from attaching to the defendant. It is plain also, in my opinion, that the standard of duty required when there exists the danger of the creation of a public nuisance is higher than where, as in this case, only a private nuisance would be

(1) (1876) 1 Q. B. D. 314, 319. (2) [1911] 2 K. B. 633, 646.

created: see *Job Edwards, Ld.* v. *Birmingham Navigations Co.* (1) In *Chadwick* v. *Trower* (2) the Exchequer Chamber had to deal with the effect of absence of knowledge on the liability of one adjoining owner to another. Baron Parke, delivering the judgment of the Court, said: "The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognisant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence: for, one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think no such obligation as that alleged exists in the absence of notice." The defendant might well ask the same question in the present case. How could she ascertain the precise degree of care which the law required of her? She did not know of the existence of the sewer; she could not, by any means short of a general excavation of her property to a depth of eight or nine feet, ascertain either where it crossed her wall, and thus the point at which, and at which alone, her duty arose, or the nature of the structure, and thus the extent of care required to prevent damage to it. As against these authorities, Mr. Montgomery relies chiefly upon *Humphries* v. *Cousins*. (3) In that case the defendant was held liable to an adjoining owner for damage caused on the latter's premises by the escape of sewage from a drain on the defendant's premises of the existence of which the defendant was unaware. The sewage came on to the defendant's premises in a drain which received his sewage,

(1) [1924] 1 K. B. 341, 350. (2) (1839) 6 Bing N. C. 1, 10.
(3) 2 C. P. D. 239.

1925

ILFORD URBAN COUNCIL v. BEAL.

[Branson J.

left his premises, and then, bending round, re-entered them. It was from a defect in that part of the drain which re-entered the defendant's premises that the leakage arose, and it is not clear from the report whether the defendant's ignorance was limited to ignorance of the re-entering of the drain or whether it extended to the presence of the drain at all. If the Court proceeded, as I think it must have done, upon the view that the defendant knew, or ought to have known, that sewage was coming upon his land, or, at all events, that his own sewage was being carried away by a drain, then the decision is an instance of the application of the law laid down in *Rylands* v. *Fletcher* (1)—namely, that a man who collects upon his land that which, if it escapes therefrom, will probably damage his neighbour, is bound to keep it there at his peril, or see to its disposal in such a manner as will prevent its injuring other people. So regarded, the case of *Humphries* v. *Cousins* (2) does not support the proposition contended for by Mr. Montgomery. Otherwise, the case cannot, in my opinion, be reconciled with the decision of the Court of Appeal in *Barker* v. *Herbert* (3) or the case of *Chadwick* v. *Trower*. (4)

The next case relied upon for the plaintiffs was *Lambert* v. *Bessey*. (5) The case itself was a case of false imprisonment, but it was quoted to me for the instances given of liability arising in respect of unintentional damage. In my opinion, the case has no bearing upon the present one. All the instances given are of acts done negligently, and accidental only in the sense that the results produced were not intended, and they were given to show the different effect upon civil and criminal liability of the absence of mens rea. Similarly, in the case of *Quarman* v. *Burnett* (6), the passage cited to me lays down no law applicable to the present case: Parke B. is there drawing the distinction between what "may be" the law in regard to real property and what the law is with regard to the user of personal property, which was at issue in that case. *Hurdman* v. *North Eastern*

(1) L. R. 3 H. L. 330.
(2) 2 C. P. D. 239.
(3) [1911] 2 K. B. 633.
(4) (1839) 6 Bing. N. C. 1.
(5) (1680) Sir T. Raym. 421, 422.
(6) (1840) 6 M. & W. 499, 510.

Ry. Co. (1) does not assist. There the defendants had negligently and improperly raised a heap of earth upon and against the plaintiff's wall, and, of course, were held liable for damage caused by the water which, in consequence of that negligence and improper act, had percolated through the plaintiff's wall. *Firth* v. *Bowling Iron Co.* (2) was also relied upon for the plaintiffs. That case, however, proceeded upon the facts (stated in the judgment) that "The nature of the wire was known to the defendants, that parts of it should fall upon the plaintiff's land was a natural result of the decay of the wire, and the pieces being hidden in the grass were naturally liable to be swallowed by the cattle grazing there." I cannot find that *Firth* v. *Bowling Iron Co.* (2) is any authority for saying that if the defendants had not known that cattle or any other animals which could possibly be damaged by their wire were likely to be grazing near their wire, the defendants would nevertheless have been liable, and that case is therefore no authority in the present one.

This disposes of all the cases which were cited to me in support of the principle contended for by the plaintiffs. Though no doubt there are to be found in some of them dicta and some isolated sentences which appear to lend some colour to the plaintiffs' contention, the decisions do not, in my opinion, really support it at all. The law is, I think, correctly stated in the passage I have cited from Comyns' Digest, and the plaintiffs' action must therefore fail by reason of the fact that the defendant did not discover, and could not by the exercise of any diligence in the circumstances reasonably have discovered, the existence of the sewer, and thus the existence and extent of her duty to the plaintiffs.

A faint effort was made at the very end of the case to suggest that there lay upon the defendant some statutory obligation towards the Commissioners of Sewers, and that that fact made some difference in the case. All I need say upon this head is that the point was not pleaded or fought. I was not even referred to the statute in question, and it would

(1) (1878) 3 C. P. D. 168. (2) (1878) 3 C. P. D. 254.

1925

ILFORD URBAN COUNCIL v. BEAL.

Branson J.

be improper for me, therefore, to discuss the matter in my judgment.

The defendant raised a second, and alternative, defence to the action, with which I need not deal, as I have come to a conclusion in her favour upon the first, but I propose to state the facts with regard to it in case they may become important hereafter: The defendant does not occupy the land under which the sewer runs; it was let by one of her predecessors in title on a weekly tenancy without any obligation towards the tenants to repair, and the same tenants are still in possession. The rents have been raised by virtue of the power contained in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, though not to the full extent of permitted increase. The defendant contends that any cause of action which the plaintiffs may have is confined to a cause of action against the occupiers. The plaintiffs contended that though that might be so where the occupier holds the land for a term of years, it was not the case where the land was occupied by weekly tenants, and where, by increasing the rent, the landlord had brought upon himself a statutory duty to repair. The point was not thoroughly argued, and, as it is unnecessary for me to express an opinion upon it, I prefer not to do so.

The result is that the action fails, and must be dismissed with costs.

Judgment for the defendant.

Solicitors for the plaintiffs: *Sharpe, Pritchard & Co., for A. Partington, Ilford.*

Solicitors for defendant Beal: *Robinson & Bradley, for P. G. Robinson, Ilford.*

Solicitors for defendant Mrs. Judd: *Torr & Co.*

F. C.

FIRMAN *v.* ROYAL.

1925
Feb. 12.

[1921. F. 46.]

Husband and Wife—Separation Order—Order for Maintenance—Arrears due at Husband's Death—Liability of his Estate—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 9.

Where a separation order has been made by justices under the Summary Jurisdiction (Married Women) Act, 1895, against a husband and also an order for maintenance, his widow may recover against his estate arrears of maintenance due under the order at his death.

In re Stillwell[1916] 1 Ch. 365 followed.

Action tried before Finlay J.

The plaintiff, Rosa Firman, who was married to Frederick Thomas Firman on March 26, 1901, applied in 1908 under the Summary Jurisdiction (Married Women) Act, 1895, to a Court of summary jurisdiction at Great Yarmouth for a separation order on the ground that her husband had been guilty of persistent cruelty to her, and by such cruelty had caused her to leave him and live separately and apart from him. On June 5, 1908, the justices made an order that the plaintiff was no longer bound to live with her husband, that she should have the custody of the two children of the marriage, and that her husband should pay her 15*s.* a week for maintenance. The husband made only a few payments under that order and none after 1909.

The husband died on February 13, 1918, having by his will left the whole of his property to the defendant, who was his sister. The estate was valued for probate at 1488*l.* net, the defendant being administratrix with the will annexed.

The plaintiff claimed to recover from the defendant, as administratrix of F. T. Firman deceased, 234*l.*, being six years' arrears of allowance due under the maintenance order.

The defendant, by her defence, said that the plaintiff was not entitled to recover the arrears in view of the death of the said F. T. Firman. She also relied on s. 9 of the Summary Jurisdiction (Married Women) Act, 1895.

1925

FIRMAN v. ROYAL.

G. Dodson for the defendant. The obligation of the husband under the maintenance order was purely personal, and ceased on his death. The Summary Jurisdiction (Married Women) Act, 1895, s. 9, specifically provides that "the payment of any sum of money directed to be made by any order under this Act may be enforced" in a particular way—namely, "in the same manner as the payment of money is enforced under an order of affiliation." That is the only remedy for enforcing a maintenance order, and it cannot be enforced in any other way. Warrington J. held in *In re Harrington* (1) that the liability of a putative father under a bastardy order is purely personal, and if the father dies the mother has no right to claim against his estate for arrears of payments under the order. That decision is directly in point, and shows that this action is not maintainable.

A. S. Leighton for the plaintiff. The decision in *In re Harrington* (1) is not applicable in the present case. There is a great distinction between a bastardy order and an order for maintenance. The father of a bastard child is only liable to support the bastard child under the Bastardy Act and then only to the extent provided by the statute, whereas a wife has a right at common law to be supported by her husband. That right is not taken away by the additional remedy given by the Act of 1895. Further, there is an appeal under the Act of 1895 from any order of justices with regard to a maintenance order to the Probate, Divorce and Admiralty Division of the High Court of Justice. A maintenance order is really analogous to an order for alimony. It was held by Sargant J. in *In re Stillwell* (2) that where an order has been made against a husband for judicial separation and for payment of alimony, his widow may recover against his estate any arrears of alimony due at his death. That decision is conclusive in the present case. The method of procedure for enforcing a maintenance order provided by s. 9 of the Act of 1895 is not exclusive. The section only says that a maintenance order "may be enforced" in the same manner as an affiliation

(1) [1908] 2 Ch. 687. (2) [1916] 1 Ch. 365.

order. Grove J. in *Davies* v. *Evans* (1) held that the word "may" ought to be construed as permissive only and not imperative, and that it merely gave a discretion. It would be very curious if the effect of giving a wife the right to obtain from justices a maintenance order against her husband would be to take away from her the right which she has at common law against her husband for support.

G. Dodson in reply. An order for maintenance is more like a bastardy order than it is like an order for alimony. The obligation of a husband for alimony does not arise ex delicto, but the obligation of a husband arising under the Act of 1895 on a maintenance order arises ex delicto and can be enforced by imprisonment. Where the cause of action is a tort or arises ex delicto there the action dies and does not survive against the executor: *Hambly* v. *Trott* (2), per Lord Mansfield; *Phillips* v. *Homfray* (3), per Baggallay L.J. In the present case the plaintiff complained to the justices of the cruelty of her husband, and therefore the obligation of her husband under the maintenance order arose ex delicto. This case is governed by *In re Harrington* (4) rather than by *In re Stillwell.* (5)

FINLAY J. In my opinion the plaintiff is entitled to recover. The facts are very simple and not in dispute. The plaintiff in 1908 obtained from justices an order under the Summary Jurisdiction (Married Women) Act, 1895, directing her husband to make her a payment of 15*s.* a week for maintenance. The husband failed to pay the sums due under the order and died on February 13, 1918, leaving an estate of a substantial amount. The plaintiff brings her action, and claims to recover the sum of 234*l.* for arrears due under the maintenance order. There is no doubt that that sum was due and owing by her husband at the date of his death, and if this order had been an order for the payment of alimony it could have been enforced against his estate.

(1) (1882) 9 Q. B. D. 238, 243.
(2) (1776) 1 Cowp. 371, 375.
(3) (1883) 24 Ch. D. 439, 468.
(4) [1908] 2 Ch. 687.
(5) [1916] 1 Ch. 365.

1925

FIRMAN v. ROYAL.

Finlay J.

It is contended by Mr. Dodson on behalf of the defendant that the plaintiff's remedy is gone by reason of her husband's death, and he relied in support of that contention upon the decision in *In re Harrington* (1), where Warrington J. held that the liability of a putative father under a bastardy order was purely personal and ceased on his death, so that the mother had no right to claim against his estate for arrears under the order. Mr. Dodson relied upon that decision coupled with s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, which provides that "the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." Mr. Dodson says that the decision in *In re Harrington* (1) is authority for the proposition that payment of money under an affiliation order cannot be recovered after the death of the putative father, and that s. 9 of the Act of 1895 puts sums of money due under a maintenance order on the same footing as sums of money due under an affiliation order.

On the other hand Mr. Leighton for the plaintiff says that there is a distinction between sums of money payable under the Bastardy Act and sums of money payable by a husband to his wife. The latter sums of money are paid by the husband under his liability at common law to support his wife, whether payable as alimony or by virtue of a maintenance order under the Act of 1895. The liability of the husband does not seem to me to be affected by the mode in which the payments are made. There is also this further distinction that an appeal is given to the Probate, Divorce and Admiralty Division of the High Court of Justice from an order of justices in respect of a maintenance order. Mr. Leighton contends that there is a direct authority on the point in the case of *In re Stillwell* (2), where Sargant J. held that where an order has been made in favour of a wife against her husband for judicial separation and for payment of alimony, arrears of alimony due at the death of the husband can be recovered by the wife from her husband's estate. I am unable to see

(1) [1908] 2 Ch. 687. (2) [1916] 1 Ch. 365.

1925

FIRMAN v. ROYAL.

Finlay J.

any distinction between the sums of money payable to a wife under an order for alimony and sums of money payable to a wife under an order of magistrates for maintenance. I do not think that the fact that an additional remedy has been given by the Summary Jurisdiction (Married Women) Act, 1895, enabling a wife to obtain a maintenance order from justices takes the sums of money payable under that order out of the category of things that are recoverable from the estate of the husband after his death. I am of opinion that the judgment of Sargant J. in *In re Stillwell* (1) is directly in point in the present case, and following it I decide this case in favour of the plaintiff.

Judgment for plaintiff.

Solicitor for plaintiff: *Humphrey Lynde, Great Yarmouth.*
Solicitors for defendant: *Letts Brothers.*

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.

1925

Jan. 27, 28; *Feb.* 19.

THE KING *v.* BATH COMPENSATION AUTHORITY.

Licensing Act—Justices—Bias—Licence—Reference of Renewal to Compensation Authority—Licensing Justices instructing Solicitor to oppose Renewal—Right of such Justices to sit on Compensation Tribunal—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 19.

On an application to the licensing justices of a county borough for the renewal of the licence of a hotel the justices referred the matter to the compensation authority of the borough under s. 19 of the Licensing Act, 1910, and at a further meeting they resolved that a solicitor should be instructed to appear before the compensation authority and oppose the renewal on their behalf. In pursuance of those instructions the solicitor appeared and supported the opposition, and in the result the compensation authority refused the renewal subject to payment of compensation:—

Held (by Bankes and Scrutton L.JJ.; Atkin L.J. dissenting), that, in view of the provisions of the Licensing Act, 1910, neither the fact that a majority of the justices who sat on the compensation tribunal and voted against the renewal of the licence had as members of the

(1) [1916] 1 Ch. 365.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

licensing committee been parties to the resolution referring the question of renewal, nor the fact that they had authorized a solicitor to appear on their behalf and oppose the renewal, afforded evidence of such bias or likelihood of bias as would disqualify them from sitting.

APPEAL from Divisional Court.

At the general annual licensing meeting for the county borough of Bath on February 8, 1924, application was made on behalf of A. C. Ashman, the licensee, and the Frome United Breweries, Ld., the owners of the Seven Dials Hotel in the said borough, for the renewal of the licence of the hotel. The question of the renewal of the licence was adjourned for consideration on the grounds of redundancy to the adjourned meeting of the licensing justices held on February 22. At that meeting the justices decided to refer the consideration of the matter to the compensation authority of the county borough under s. 19 of the Licensing Act, 1910 (1), on the ground that in their opinion the licence was not required having regard to the number of licensed houses in the neighbourhood. There were present at that meeting and voting for the resolution the following seven justices: Colonel Lewis, Mr. Colmer, Mr. Bush, Mr. Spear, Mr. Cowley, Mr. Shewring, and Mrs. Long. At a further meeting of the licensing justices held on May 9, 1924, it was resolved, "That the clerk be instructed to write to Mr. A. E. Withy," a solicitor, "asking whether he would be prepared to act for the licensing justices in opposing the renewal of the licence referred to the

(1) By s. 19 of the Licensing (Consolidation) Act, 1910, sub-s. 1: "Where the licensing justices, on the consideration by them, in accordance with this Act, of applications for the renewal of justices' licences, are of opinion that the question of the renewal of any particular old on-licences requires consideration on grounds other than those on which the renewal of an old on-licence can be refused by them, they shall refer the matter to the compensation authority, together with their report thereon."

Sub-s. 2: "The compensation authority shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to the compensation authority unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the licensing justices), an opportunity of being heard, and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

compensation authority, and, in the event of his agreeing to act, to instruct him." The following five justices were present and voted for that resolution: Colonel Lewis, Mr. Colmer, Mr. Bush, Mr. Bagshawe, and Major Reilly. In pursuance of that resolution the clerk instructed Mr. Withy to appear on behalf of the licensing justices before the compensation authority and oppose the renewal. The principal meeting of the compensation authority was held on June 13, and at the sitting of the tribunal there were present seven justices, Mr. Bagshawe in the chair, Colonel Lewis, Mr. Bush, Mr. Spear, Mr. Hope, Mr. Cowley, and Major Reilly. The solicitor appearing for the applicants objected to any of the licensing justices sitting as members of the Court on the ground that they had instructed Mr. Withy to oppose the renewal on their behalf. That objection was overruled. The two last-mentioned justices, Mr. Cowley and Major Reilly, having other engagements, then left the Court, and evidence on oath for and against the renewal was then heard before the remaining five, who decided to refuse the renewal subject to the payment of compensation. Of those five three had been parties to the resolution of February 22 referring the renewal to the compensation authority, and three had signed the resolution of May 9 authorizing the employment of Mr. Withy. The applicants then applied to the King's Bench Division for a writ of certiorari to bring up the order of the justices refusing the renewal to be quashed upon the ground that the majority of them were disqualified from sitting by reason of interest.

The Divisional Court (Lord Hewart C.J., Shearman and Salter JJ.) being of opinion that the proceeding before the compensation authority was not a judicial proceeding, but a matter of local administration, and that consequently the fact of the justices objected to being biased against the renewal was no objection to their sitting on the compensation tribunal, dismissed the application.

The applicants appealed.

Macmorran K.C. and *Croom-Johnson* for the appellants. A majority of the justices who sat upon the compensation

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

tribunal were disqualified from so sitting by reason of interest. That the compensation authority is a judicial and not a merely administrative body appears to be clear from the authorities. In *Rex* v. *Southampton Justices* (1) it was held that where the compensation authority refuse to renew a licence they may be ordered to state a case, which they could not be ordered to do if, in so refusing, they were not acting judicially. For the same reason they cannot act upon evidence which is not given upon oath: *Dartford Brewery Co.* v. *County of London Quarter Sessions.* (2) It is true that in *Leeds Corporation* v. *Ryder* (3) the House of Lords held, reversing the decision of the Court of Appeal (4), that the licensing justices, when referring the question of renewing a licence to the compensation authority, are acting administratively, and that a certiorari will not lie to bring up the order of reference, but they did not mean that the whole proceedings, including those before the compensation tribunal itself, are administrative only. Then if the compensation authority are a judicial body it is essential that they should be free from anything in the nature of bias. That they were not free from bias in this case is shown by the fact that three of the five justices who made the final order refusing the renewal of the licence to the Seven Dials had previously voted for the instruction of Mr. Withy to appear and oppose the renewal before themselves. The Court below thought that what was being considered before the compensation tribunal was merely a matter of local administration and not a subject of judicial inquiry, and they consequently were of opinion that the case was substantially undistinguishable from *Rex* v. *Cheshire Justices.* (5) There it was held that a justice of a county borough is not disentitled to sit as one of the compensation authority by reason of the fact that he was one of the licensing justices who referred the question of the renewal to them. That may well be regarded as free from objection, for the order of reference is quite consistent with their going

(1) [1906] 1 K. B. 505.
(2) [1906] 1 K. B. 695.
(3) [1907] A. C. 420.
(4) Sub nom. *Rex* v. *Woodhouse* [1906] 2 K. B. 501.
(5) [1906] 1 K. B. 362.

to sit on the compensation tribunal with a perfectly open mind. They have given no decision, but only expressed the opinion that the matter is one which "requires consideration." But it is quite another thing for them to instruct a solicitor to appear at the hearing and oppose the renewal on their behalf. That conclusively shows that they have no longer an open mind and are incapable of approaching the subject in a judicial spirit. Therefore they ought not under the circumstances to sit. In *Rex* v. *Cheshire Justices* (1) the justice objected to took no part in instructing counsel to appear for the justices to oppose the renewal. Mr. Danckwerts, who appeared to show cause against the rule, admitted that "on general principles justices who instruct counsel to appear for them to oppose a renewal would be debarred from adjudicating on the question," and Lord Alverstone apparently accepted that view. That case therefore does not cover the present. So important is the rule that the same person should not act as prosecutor and judge, that in *Reg.* v. *Lee* (2), where the sanitary committee of a town council directed their clerk to prosecute one S. for an offence against the Public Health Act, 1875, and upon that prosecution S. was convicted before certain justices of the borough, one of whom was a member of the sanitary committee, it was held that s. 258 of the Act, which provides that "no justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority," did not remove the disqualification which attached to the justice by reason of his having as a member of the sanitary committee directed the prosecution, and that the conviction must be quashed. Field J. there pointed out that what the section enacted was that "the mere fact of membership should not disqualify the justice." It was the fact of the justice being a party to the resolution directing the prosecution that caused him to be disqualified. In the absence of an enabling section such as that in the Public Health Act mere membership of a body which directs a prosecution disentitles a person from sitting as a justice at the hearing. Thus in *Reg.* v.

(1) [1906] 1 K. B. 362. (2) (1882) 9 Q. B. D. 394.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Fraser (1) a magistrate who was a member of a temperance body which opposed the transfer of a licence and appeared by a solicitor in opposition before the licensing justices, was disqualified from sitting, notwithstanding that he had not actually been party to the instruction of the solicitor.

Holman Gregory K.C. and *Wethered* for the respondents. The proceedings before the compensation authority were not judicial. In *Rex* v. *Woodhouse* (2) the Court of Appeal indeed held that the licensing justices in referring the consideration of the renewal of a licence on other grounds than those on which the renewal of an old beerhouse licence could be refused were acting judicially. But that decision was reversed in the House of Lords. (3) Lord Loreburn said: "The justices acting under s. 1, sub-s. 2, of the Act of 1904"—now s. 19 of the Act of 1910—"act administratively, for they are exercising a discretion which may depend upon considerations of policy and practical good sense"; he added, "they must of course act honestly." As long as the licensing justices act honestly no objection can be taken to their action. Not being a judicial tribunal it is immaterial that they may be biased. That decision was no doubt directly concerned with the question whether a certiorari would lie to the licensing justices to bring up the order of reference, but exactly the same principle must apply to the decision of the compensation authority. The whole of the proceedings under s. 19 are one, and if the question whether the renewal shall be referred depends "upon considerations of policy and practical good sense," so also must the ultimate decision of the compensation authority similarly depend. The object of the statute was to enable superfluous licensed houses to be closed in the public interest upon payment of compensation, and for the purpose of carrying out that object it provided a procedure which is wholly unlike that of judicial proceedings. In the first place the licensing justices who have special knowledge of the local conditions and know which houses can best be dispensed with are to make a report to the compensation authority, who may give the licensing

(1) (1893) 9 Times L. R. 613.
(2) [1906] 2 K. B. 501.
(3) Sub nom. *Leeds Corporation* v. *Ryder* [1907] A. C. 420, 423.

justices, as being persons "interested in the question of the renewal," an opportunity of being heard—that is, by solicitor or counsel. But before the hearing there is to be, by r. 9 of the Licensing Rules, 1910 (1), a preliminary meeting at which the chairman and two other of the licensing justices are to have, by r. 11, the right to attend "for the purpose of consulting with the compensation authority as to the report." That meeting is a private one, at which the licensee and the owner of the licensed house have no right to be present. That is wholly inconsistent with the proceedings being regarded as judicial. The provision in s. 21, sub-s. 5, that "such expenses of the licensing justices incurred with respect to the matter of the reference . . . . as the compensation authority may allow shall be paid out of the compensation fund" was probably inserted to meet the very case of the employment of a solicitor to represent the licensing justices at the principal meeting of the compensation authority. It seems unreasonable for the licensee to object to the licensing justices instructing a solicitor, for if they have, under r. 11, a right to attend at the preliminary meeting and influence the minds of the compensation authority in private, it is to the interest of the licensee that they should at the principal meeting state openly by their solicitor what are the objections which the licensee is required to meet. But even if compensation proceedings are to be regarded as judicial the Act provides that bias on the part of the justices shall be no objection. In *Rex* v. *Cheshire*

(1) By r. 9 of the Licensing Rules, 1910: "The compensation authority shall in each year . . . . hold a meeting (in these rules referred to as 'the preliminary meeting') for the preliminary consideration of any reports from renewal authorities within their area."

Rule 11 (1.): "The compensation authority shall send to every renewal authority from whom a report has been received not less than seven days' notice of the date fixed for the preliminary meeting; and the chairman of any such renewal authority and any number of members of that authority, not exceeding two, appointed by the authority for the purpose, and any officer of that authority so appointed shall have the right of attending the preliminary meeting for the purpose of consulting with the compensation authority as to the report of the renewal authority."

(2.) "This rule shall not apply in a case where all the members of the renewal authority are also members of the compensation authority."

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Justices (1) Darling J., speaking of a justice who had voted for the reference of the question of renewal, said: "It is contended that such a man is biased. Well, it may be or it may not be that he is, but the Legislature have, as it seems to me, deliberately provided that such a justice may take part in the consideration of the report. Of course he may be biased (if that word is to be used) in favour of the report or against it, but no doubt he goes to the committee of quarter sessions with a formed view on the subject of the report. I think this legislation makes an absolute exception to the ordinary rule governing judicial proceedings. Nothing like it has occurred before." It provides that the justices who initiate the proceedings shall be competent to act as the final judges.

Macmorran K.C. in reply.

Cur. adv. vult.

Feb. 19. The following written judgments were delivered.

BANKES L.J. This appeal from the Divisional Court raises an important question. Application had been made to that Court on behalf of the owners and licensee of the Seven Dials Hotel at Bath for a writ of certiorari calling upon the justices of the county borough of Bath, acting as the compensation authority for the said borough, to show cause why the order made by the said compensation authority refusing the renewal of the licence to the said premises should not be quashed upon the ground that the justices were disqualified by interest from adjudicating, and were adjudicating in their own cause. The facts upon which the application was founded were not really in dispute. At the general annual licensing meeting for the borough of Bath held on February 22, 1924, the question of the licence to the said premises was referred to the compensation authority by the licensing justices then present, with a report, which is dated April 30, 1924, which states that in their opinion the licence was not required. On May 9 a meeting of the compensation authority was held, at

(1) [1906] 1 K. B. 362, 371.

which it was decided to proceed upon the said report. There is no evidence as to who the justices were who were present at that meeting. On the same day, May 9, a meeting of the licensing justices sitting in transfer sessions was held, and the justices then present considered the advisability of the licensing justices being represented before the compensation authority. A resolution was then passed instructing the clerk to write to a solicitor named in the resolution, asking him whether he would appear for the licensing justices, and, "in the event of his agreeing, to instruct him." This resolution was signed by the five justices who were present. The solicitor did consent to appear, and was duly instructed by the clerk to the justices.

The principal meeting of the compensation authority was held on June 13, when seven justices were present. The solicitor who had been instructed to appear on behalf of the licensing justices appeared on their behalf. The solicitor appearing for the owners and licensee then objected to any of the justices who had sat at the general annual licensing meeting, on the occasion when the licence was referred, sitting as members of the compensation authority. The objection was overruled, the hearing proceeded, and ultimately the licence was refused, subject to compensation. All the seven justices who were present at the principal meeting took part in overruling the objection of the solicitor for the owners and licensee. Five only of the seven took part in the final decision to refuse the licence. Of these five, three had been parties to the decision on February 22 to refer the licence, and two of these three had signed the resolution authorizing the employment of the solicitor. One of the remaining two had been a party to the decision to refer the licence, but had not been a signatory to the resolution to employ the solicitor. The other of these two did not appear to have taken any part in the previous proceedings. Of the two justices who took part in overruling the objection, but who left before the final decision, one had been a party to the decision to refer the licence; the other had been a party to the resolution to employ the solicitor. Upon these facts it appears that all

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Bankes L.J.

the justices, except one, forming the compensation authority on the occasion in question had taken part either in the decision to refer the licence, or in the decision to employ a solicitor. It further appears that both when a decision was arrived at overruling the objection, and when the final decision was come to refusing the licence, a majority of the members forming the compensation authority had been parties to the decision to refer the licence, and to the resolution to employ a solicitor.

It is upon the facts above stated that the allegation of interest is founded. The Divisional Court discharged the rule nisi which had been granted, and it is from that decision that the present appeal is made.

The rule that no man shall be a judge in his own cause is firmly engrafted in our law, and one reason why the administration of justice in this country is so generally regarded as impartial is that the Courts are always ready to enforce it. In *Allinson* v. *General Council of Medical Education* (1) Lord Esher adopts what Bowen L.J. in *Leeson's* case (2) had described as the crucial question in such a matter as the one we are now considering—namely, whether in substance and in fact one of the judges has also been an accuser. Later on in his judgment Lord Esher says that the answer in each case must depend upon the relation of the impugned judge to the matter upon which he has to adjudicate. The complaint in the present case is that all the justices, except one, composing the compensation authority on the occasion when the licence of the Seven Dials Hotel was refused subject to payment of compensation were both judges in their own cause and were disqualified by interest. Before deciding that a person is disqualified by interest, the Courts have always been influenced, not only by the extent, but also by the nature of the interest, and have drawn a sharp distinction between a pecuniary and any other kind of interest. If a direct pecuniary interest, however small, in the subject matter of the inquiry is established, disqualification follows as a matter of course, unless the interest has been disclosed and waived. If the interest

(1) [1894] 1 Q. B. 750, 758. (2) (1889) 43 Ch. D. 366, 384.

alleged is other than a pecuniary one, then, as Blackburn J. (as he then was) says in *Reg.* v. *Rand* (1) the objection is one, not in the nature of interest, but of a challenge to the favour, and a real likelihood of bias must be shown. In *Rex* v. *Sunderland Justices* (2) Vaughan Williams L.J. states the rule thus: "The judgment in *Reg.* v. *Rand* (1) clearly shows that there is another case—namely, that in which the objection is not on the ground of pecuniary interest, but in the nature of a challenge to the favour. In such a case there is no such presumption as arises in the case of a pecuniary interest, but the question is whether there is a real likelihood, arising from circumstances such as would give rise to a challenge to the favour, that the judge or justice would have a bias." It is not of much assistance, I think, to discuss the cases in which upon the facts before them our Courts have considered that a real likelihood of bias was established. *Rex* v. *Fraser* (3) may perhaps be referred to as a case where a Divisional Court, on facts not dissimilar to those in the present case, quashed the proceeding on the ground of bias. No point was taken in that case, such as is taken in the present one, arising out of the constitution of the tribunal. It is in reference to that point that the difficulty arises. Apart from the peculiar constitution of the compensation authority, and the statutory provisions as to its authority and powers, constituting, as it does, a branch of the machinery set up to administer the licensing laws, which are of a very special character, I should have had no hesitation in holding that the facts of the present case do disclose a real likelihood of bias.

In very many cases, to some of which I must refer, the peculiar authority vested by Parliament in licensing justices has been commented upon, and has resulted in decisions quite contrary to what would have been given had the authority vested in licensing justices been regarded as an ordinary exercise of judicial authority. A very instructive judgment on this point was delivered by Collins M.R. in *Rex* v. *Howard.* (4) The objection in that case was that

(1) (1866) L. R. 1 Q. B. 230.
(2) [1901] 2 K. B. 357, 371.
(3) 9 Times L. R. 613.
(4) [1902] 2 K. B. 363, 373, 375, 376.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Bankes L.J.

the justices were incapacitated from dealing with the question of the renewal of licences, inasmuch as they were at once parties and judges, and that they must be deemed to be biased on the ground that they had predetermined to refuse to renew some of the licences and had already inquired into the cases. The Master of the Rolls says: "In considering how far these points are material, it is necessary to understand precisely what is the character in which the justices are required by law to deal with questions of renewal. Whatever views may have been held as to their position before *Boulter* v. *Kent Justices* (1) was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the justices do not sit as a court, and that the transaction itself is in no sense a 'lis' to which there are parties. The objector is not a 'party'; his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not. This point is so material to the true appreciation of the cardinal consideration in these cases that I propose to read one or two passages from the judgments of Lord Halsbury L.C. and Lord Herschell in the case I have just referred to." He then quotes certain passages, including the passage in Lord Halsbury's speech where he says: "The Acts referred to by the learned judges were repealed by the Act of 1828. But a careful distinction appears to me always to have been reserved between the same bodies acting as a court, and deciding questions of licensing at a licensing meeting of the justices." The Master of the Rolls goes on to say: "The standard, therefore, to be applied in determining whether justices have incapacitated themselves from dealing with the renewal of licences is not in any sense that applicable to judges dealing with litigation. Moreover, their position in relation to the right of objecting is not res integra. Since *Reg.* v. *Farquhar* (2), at all events, decided in 1874, the practice has been that they might, where circumstances required it, themselves make or cause to be made an objection, at all events provided they adjourned for the purpose of hearing

(1) [1897] A. C. 556.

(2) (1874) L. R. 9 Q. B. 258.

it, and caused the necessary notice to be served requiring attendance upon a future day. I think this practice was founded on a true view of the law for reasons which I will state hereafter, but, whether it is or not, I think it has been treated as law for nearly thirty years, and ought not to be now disturbed." Again he says: "The key to the position appears to be that the justices, in dealing with licences, are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the Legislature that they should divest themselves of all such knowledge in dealing with questions of licences. It would be a great public misfortune if they were bound to determine the question merely on materials provided by the individual who happened to object, and were constrained to sit by in silence although they had reason to suppose that there were very good grounds which ought to be inquired into before the matter was decided; and yet, if they were debarred from making an objection or causing one to be made, these facts never could be inquired into, and the licence would have to be disposed of without the necessary investigation. I think, therefore, that the practice is not only inveterate, but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges, in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson* v. *General Council of Medical Education and Registration* (1) and *Allinson* v. *General Council of Medical Education and Registration* (2) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection

(1) 43 Ch. D. 366. (2) [1894] 1 K. B. 750.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Bankes L.J.

they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them." Lord Halsbury, in the case referred to (1), had expressed his view as to the position of justices at a licensing meeting as follows: "I do not think they are a court at all. The whole licensing system has been conducted under a code of its own, and the Act of 1828 has provided a variety of provisions, and has constituted a form of procedure which does not appear to me to come under the description of a court." It is upon a foundation thus described that the machinery for the refusal to renew licences on payment of compensation has been erected. It was first introduced by the Licensing Act, 1904, and has been continued by the Licensing Act, 1910. A compensation authority has been set up in each county and borough, in whom the final decision as to whether the renewal of a licence should be granted or refused on payment of compensation has been vested. The initiative in bringing any particular licence before the compensation authority has been entrusted to the licensing justices of the district in which the licensed premises are situated. If the Legislature intended that the question of bias should be judged from the standpoint applicable to ordinary judicial proceedings, they certainly set about it in an odd way. The case of a county borough (which Bath is) is perhaps the best illustration to take. In such a case the compensation authority are the whole body of borough justices. In other words the body to take the preliminary, and the body to make the final decision are the same. Sect. 19, sub-s. 2, especially provides that the body who took the preliminary decision may appear and be heard before the body who give the final decision. In other words, the Bath justices, sitting as the licensing authority, may not only refer a licence to the Bath justices sitting as the compensation authority, but as Bath justices they are entitled to appear and be heard before themselves. As compensation authority

(1) *Boulter* v. *Kent Justices* [1897] A. C. 556, 561.

they are also authorized by s. 21, sub-s. 5, to allow their expenses as licensing justices, which would apparently include the expense of appearing and being heard before themselves. This is not the only instance where Parliament, in the provisions of the Licensing Act, 1910, has indicated that it is legislating in respect of the form of procedure referred to by Lord Halsbury in *Boulter* v. *Kent Justices.* (1) In the case of the preliminary meeting of the compensation authority, r. 11 of the Licensing Rules, 1910, provides for a preliminary discussion in private between members of the compensation committee and the chairman and any two members of the renewal authority who had referred a licence for compensation, as to whether the reference shall proceed. The rule, not unnaturally, provides that in the case of a county borough such a meeting shall not be necessary. The significance of the above provisions is emphasized by the fact that the Act contains a disqualification section in which no objection is taken to a justice who has taken part in a decision to refer a licence for compensation sitting as a member of the compensation authority who decide whether the licence shall be refused or not. I do not think that this Court can decide in the appellants' favour without overruling the decision in the case of *Rex* v. *Cheshire Justices.* (2)

It is necessary, therefore, to see what view has been taken in other cases of the tribunals set up by the Licensing Acts, 1904 and 1910, to deal with this branch of our law. So far as this Court is concerned, I think that it has been decided that the compensation authority at their principal meeting are a judicial authority acting judicially: *Colchester Brewing Co.* v. *Tendring Justices.* (3) This decision, however, does not dispose of the question of bias on the part of a justice who is only acting as the Legislature has authorized him to act. The same Court (consisting of Lord Alverstone, Ridley and Darling JJ.) which decided *Rex* v. *Southampton Justices* (4) decided *Rex* v. *Cheshire Justices* (2) on the very same day. In the first of these cases the majority of the Court rested

(1) [1897] A. C. 556, 561.
(2) [1906] 1 K. B. 362, 371.
(3) [1916] 2 K. B. 126.
(4) [1906] 1 K. B. 446.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Bankes L.J.

their judgments on the view that the compensation authority at the principal meeting was acting in a judicial capacity, yet in the second case the same Court held that a justice was not disqualified on the ground of bias from sitting as a member of the compensation authority at the principal meeting, because he was one of the justices who referred the matter to the authority. In his judgment in this case Darling J. says: "It is contended that such a man is biased. Well, it may be or it may not be that he is, but the Legislature have, as it seems to me, deliberately provided that such a justice may take part in the consideration of the report. Of course, he may be biased (if that word is to be used) in favour of the report or against it, but no doubt he goes to the committee of quarter sessions with a formed view on the subject of the report. I think this legislation makes an absolute exception to the ordinary rule governing judicial proceedings. Nothing like it has occurred before." The case of *Rex* v. *Woodhouse* (1) is an instructive instance of the importance attached to the peculiar jurisdiction created by the Legislature for dealing with licensing questions. In the first instance the case came before the same Court that decided *Rex* v. *Cheshire Justices* (2), who held that justices who, when sitting at the general annual licensing meeting, had referred certain licences for compensation acting in accordance with an arrangement previously made with the owners of the premises and without judicial consideration of objections made to the renewal of the licences, were not disqualified from acting. (3) This decision was reversed on appeal, but was reinstated by the House of Lords. (4) Lord Loreburn deals with the question of bias. He says: "The second ground urged for the respondents was that some at least of these justices were biased by their having previously taken part in certain arrangements when the Corporation offered that these public houses should be suppressed and compensation paid. The justices acting under s. 1, sub-s. 2, of the Act of 1904 act administratively, for they are exercising

(1) [1906] 2 K. B. 501.
(2) [1906] 1 K. B. 362.
(3) 22 Times L. R. 603.
(4) [1907] A. C. 420, 423.

a discretion which may depend upon considerations of policy and practical good sense, and they must, of course, act honestly. That is the total of their duty." In a case in Ireland: *Rex* v. *Dublin Justices* (1), Palles C.B. in a long and interesting judgment deals with the English authorities, and as a ground for his decision on part of the case uses this significant language: "Further adopting the standard of bias rendered necessary by the double character of objector and adjudicating justice, which under the relevant legislation can be filled by the one person at the same time, I am of opinion that neither" of the two persons mentioned "has been shown to have been biased." I am free to confess that in the present case I should not have been sorry had it been possible to come to a different conclusion from the one at which I have arrived. Having regard, however, to the long course of legislation on this particular subject, the trend of the authorities, and the fact that the case of *Rex* v. *Cheshire Justices* (2) has stood unchallenged for so long, I find myself unable to say that the fact that the majority of the justices forming the compensation authority on the occasion in question had sat at the licensing sessions and had referred the licence for compensation is of itself sufficient evidence of bias on their part.

The only remaining question is whether the fact that a majority of the members of the compensation authority who refused the licence had signed the resolution to employ a solicitor ought to be held to be a disqualification. The form of the resolution, and the evidence of the justices to the effect that beyond signing the authority authorizing the employment of a solicitor on behalf of the whole body of licensing justices they took no part whatever in instructing the solicitor, must not be lost sight of, though had the case not been one of the exercise of jurisdiction under the licensing law these facts would not, in my opinion, have been sufficient to exclude the inference of bias. The very peculiar circumstances of this case must be clearly borne in mind in dealing with this question of the employment of the solicitor. In the first

(1) [1904] 2 I. R. 75, 99. (2) [1906] 1 K. B. 362.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Bankes L.J.

place, as the compensation authority has no power to award costs, the question of pecuniary interest as a result of the employment does not arise. The question, therefore, resolves itself into a consideration of whether actual bias or a real likelihood of bias on the part of the justices composing the compensation authority should be inferred from the fact of a solicitor having been instructed to appear under the circumstances under which he was instructed. On the question of actual bias, it appears to me that the justices are entitled to have the matter looked into from their point of view, and that they are entitled to claim that the employment of a solicitor under the circumstances of the case should tell in their favour rather than against them. At the time they signed the authority to employ a solicitor they knew that they were entitled to sit, and that they or some of them would sit, as members of the compensation authority. There was no necessity, therefore, to employ a solicitor to convince a hostile tribunal. I think that they were entitled to feel that the only result of employing a solicitor would be to give the parties interested notice of the grounds of objection, and an opportunity of dealing with them, and to ensure a full and complete hearing, and that to this extent the parties interested were better off than if they as members of the compensation authority remained silent and acted upon their previously formed opinion.

On the question whether the circumstances indicate a real likelihood of bias, it must be borne in mind that the proceedings before the principal meeting of a compensation authority do not depend upon whether an objection is taken before them to the renewal of a licence. The question whether the licence shall be renewed or not has been referred to them by the renewal authority, and they must deal with the matter whether an objector appears or not. The renewal authority are entrusted by the Legislature with the supervision and control of licensed premises within their area, and it seems to me only reasonable that when, in the exercise of their jurisdiction, they have referred a licence for compensation they should take the necessary steps to see that the matter should be

properly laid before that body. Whether they give the necessary instructions to the police to put the case before the compensation authority or whether they give instructions that a solicitor shall be employed to do so seems to me to be immaterial. Whether the adoption of the latter course is due to the belief that the costs can be allowed out of the compensation fund I do not know.

Under the circumstances, I do not think that it would be fair to the justices to say that instructions given under these circumstances, whether to the police or to a solicitor, ought to be regarded as an indication of such a real likelihood of bias as would entitle a Court to interfere. The real cause of complaint, to my mind, is that the justices who acted as the renewal authority acted again as members of the compensation authority. If, under the circumstances, the Court cannot interfere to prevent this, it appears to me to be a case of straining at a gnat after swallowing a camel to complain of the appearance of the solicitor. If the practice in relation to the administration of the licensing laws is to be altered, it must be done by the Legislature. For the reasons I have given, this appeal, in my opinion, fails, and must be dismissed with costs.

Nothing that I have said touches a case where a real likelihood of bias is established; and if I felt myself at liberty to draw the inference that was drawn by the Court in *Rex* v. *Sunderland Justices* (1) or in *Rex* v. *Halifax Justices* (2) I should, of course, arrive at a conclusion other than that at which I am compelled to come.

SCRUTTON L.J. This is an appeal from the refusal of the Divisional Court to issue a writ of certiorari to the justices acting as the compensation authority for the City of Bath to remove into this Court a certain order refusing a licence to the Seven Dials Hotel in that city that the order might be quashed. The grounds of the application for certiorari appear to be that some of the members of the compensation authority were also members of the licensing authority, and as such

(1) [1901] 2 K. B. 357. (2) (1912) 76 J. P. 233.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Scrutton L.J.

were represented by a solicitor before the compensation authority. The exact facts are stated in the judgment of Bankes L.J. As we are affirming the decision of the Court below, I might content myself with saying that I entirely agree with that judgment, but in view of the difference of opinion in this Court I shortly express my views in my own words.

It is no doubt generally desirable that a person appealed from should not sit in the Court considering an appeal from his judgment, though it is impossible to say that such a course is necessarily illegal, when it is remembered that before the Judicature Acts a member of one of the three common law courts who had heard a case at nisi prius frequently sat in the court in banc which reviewed his decision. At present a Lord Justice of Appeal may have to decide whether his own judgment as a judge of first instance was correct. It is also no doubt generally undesirable that a member of a court should appear by counsel before the court of appeal which considers the correctness of his decision, and of which he is a member, to support that decision.

But the system established by the Licensing Act of 1904 and continued in the Act of 1910 is a peculiar one. The licensing authority need not express any opinion as to whether a licence should be refused on grounds other than those on which they themselves can refuse an old on-licence. If they are of opinion that the question of renewal should be considered on these other grounds, they refer the matter to the compensation authority, making a report to them, which need not express any opinion except that the matter should be considered. The compensation authority do not hear the matter by way of appeal, for there is no order to appeal against, but as an original hearing of a matter referred to them. It is clear that Parliament contemplated that members of the licensing authority which referred a matter for decision might also be members of the compensation authority which decided the matter referred. In a county borough all the justices may be and frequently are the licensing committee, and all the justices are the compensation authority. Where the confirming

authority is a joint committee, it consists of six justices, the quorum being five; three of the six must be borough justices, at least two of whom must be included in the quorum. The confirming authority must, therefore, contain members of the authority whose decision it confirms. Under rr. 9 and 10 of the Licensing Rules, 1910, when the licensing authority has referred the matter to the compensation authority a preliminary meeting is held, at which three members of the licensing authority consult with the compensation authority, in the absence of the licensee affected, as to the report of the licensing authority. The rule expressly adds that if all the members of the renewal or licensing authority are also members of the compensation authority the limitation to three representatives need not apply. So that the members of the renewal authority are allowed by statute to put their views before the compensation authority and to be members of the compensation authority and consider the matter in the absence of the licensee. Under these circumstances it appears to me to the advantage of the licensee that the licensing authority should by counsel before the compensation authority in the presence of the licensee put forward their views and the evidence on which they acted. He can deal with the matter better if he hears these reasons than if those of the licensing authority who are members of the compensation authority stated those reasons in private to the rest of the authority. The view I have expressed is, as to double membership of the two authorities, in accordance with the view of the Divisional Court in *Rex* v. *Cheshire Justices* (1), which has regulated the practice for the last twenty years without interference by Parliament, and which I think was correctly decided. As to appearing by counsel, in the *Cheshire* case (1) the licensing justices appeared by counsel, but the justice whose presence was objected to "took no part in instructing counsel," except I suppose by being a member of a body which authorized the appearance of counsel in its behalf. The magistrates objected to in the present case appear to be in the same position, and

(1) [1906] 1 K. B. 362.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Scrutton L.J.

their action is authorized by the *Cheshire* case. (1) In that case Lord Alverstone thought that if the magistrates had actively instructed counsel the case would have been different. Darling J. appears to have thought the result would be the same. In the case of *Mitchell* v. *Croydon Justices* (2), where a magistrate, a member of the licensing authority, gave evidence before the compensation authority as to a particular licence, having previously sat as a member of the compensation authority at the first hearing of the case, though not at the hearing at which he gave evidence, the Divisional Court would not interfere with the second decision, though they expressed a strong opinion that it was not desirable his example should be followed. But Parliament has in s. 19 of the Act of 1910 allowed licensing justices to be heard before the compensation authority as " persons interested in the renewal of the licence," and yet, by the earlier sections, has allowed licensing justices, though interested in the renewal of the licence, to sit on the compensation authority which considers the renewal. I agree that bias in the justice disqualifies him from sitting on the compensation authority.

I agree that actively to instruct counsel before that authority, or giving evidence before that authority, may be strong evidence of bias. The slightest amount of pecuniary interest disqualifies, but bias, if not pecuniary, to disqualify must be substantial: see per Blackburn J. in *Reg.* v. *Meyer*. (3) I do not think that membership of a body which has instructed counsel to appear for it is sufficient evidence of bias, where the particular individual has done nothing else in the way of instructing counsel, and where Parliament has expressly allowed such an individual to be a member of the compensation authority which considers his report as a member of the licensing body. I entirely agree that in judicial matters not only evil but the appearance or suspicion of evil should be avoided, but in this case Parliament has authorized an anomalous proceeding, which must give rise to suspicion of evil in some minds, and, taking that anomalous position as

(1) [1906] 1 K. B. 362. (2) (1914) 78 J. P. 385.
(3) (1875) 1 Q. B. D. 173, 177.

established, I think it is better for the licensee that he should know by counsel's appearance what the licensing justices are thinking than that he should not know, because they sit on the Bench and only give their reasons in private, as they have already done with the permission of Parliament at the preliminary meeting. It is perhaps unnecessary to add that this judgment only applies to the peculiar position created by Parliament in the Licensing Act of 1910.

In my view the appeal should be dismissed with costs.

ATKIN L.J. This is an appeal from an order of the King's Bench Division discharging a rule for certiorari addressed to the justices of Bath as the compensation authority for that county borough to remove an order made by them on June 16, 1924, refusing to renew the licence of fully licensed premises known as the Seven Dials Hotel. The ground for the application is the allegation that some of the justices who made the order were disqualified by interest.

The facts as disclosed by the affidavits are as follows. On February 22, 1924, at an adjourned meeting of the licensing committee for the county borough it was decided by the licensing justices to refer the question of renewal of the licence to the compensation authority. At that meeting seven of the licensing committee sat, including Colonel Lewis, Mr. Bush, Mr. Colmer, Mr. Spear, and three others. On April 30 the licensing committee duly made their report to the compensation authority, signed on their behalf by Mr. Fuller, their clerk. The report stated the facts and stated that in view of the large number of other licensed houses in the neighbourhood this house did not appear to be required, though the licensee stated that he objected to its being closed and wished to remain there, and had held the licence for nineteen years. It also stated that the owners also objected to the closing. On May 9 the compensation authority, which consists in Bath, being a county borough, of all the justices of the borough, held its preliminary meeting, and decided to proceed with the question of the renewal of the licence referred to them. On the same day the

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Atkin L.J.

licensing committee, sitting at a transfer meeting, passed this resolution: "That the clerk be instructed to write Mr. A. E. Withy asking whether he would be prepared to act for the licensing justices in opposing the renewal of the licence referred to the compensation authority and in the event of his agreeing to act to instruct him." Mr. Withy did agree to act, and in pursuance of the instructions in the resolution Mr. Fuller did instruct him. The licensing justices who were present when the resolution was passed were Colonel Lewis, Mr. Bush, Mr. Colmer, Mr. Bagshawe and Major Reilly, of whom the first three only had been sitting when the licence was referred. On June 13 the principal meeting of the compensation authority was held. Mr. Fuller, the clerk to the licensing justices, with commendable prevision sent to all the justices of the borough who were not members of the licensing committee and were not disqualified a letter pointing out that it was desirable that some of the justices who were not members of the licensing committee should sit at the meeting of the compensation authority. The Bath justices appear to have every confidence in their licensing committee, and the letter resulted in the attendance of one justice only who was not a member of the committee, Mr. Hope. In addition to him there sat Colonel Lewis, Mr. Bush, Mr. Bagshawe, Major Reilly, Mr. Spear and Mr. Cowley. At the hearing Mr. Wansbrough, solicitor, appeared for the owners of the Seven Dials in support of the renewal. Mr. Withy, in pursuance of the instructions mentioned above, appeared to oppose. Mr. Withy said that he appeared for the licensing justices, whereupon Mr. Wansbrough objected to the justices sitting who were licensing justices, on the ground that they had instructed a solicitor to oppose the licence. This objection was overruled by the justices. After this decision Major Reilly and Mr. Cowley withdrew, having other engagements, and the remaining justices proceeded to deal with the question of renewal, and, after hearing the evidence and arguments adduced by Mr. Wansbrough and the evidence and arguments adduced by Mr. Withy, decided to refuse renewal. Of the five justices who so decided three, Mr. Bagshawe, the presiding

justice, Colonel Lewis and Mr. Bush, had instructed Mr. Fuller to instruct Mr. Withy to oppose, Mr. Spear had been one of the justices who had decided to refer the licence, while Mr. Hope remained the one trophy of Mr. Fuller's quest for independence. The question is whether the decision of the justices can stand in these circumstances, where the majority at any rate of the Court have decided on evidence and arguments put forward by an advocate retained on their authority to endeavour to secure from them the very decision which they in fact gave. In my opinion, it would be lamentable if any system of justice permitted such procedure, and I propose to show that principle and authority require this Court to grant the remedy asked for by the applicants, a writ of certiorari.

The first question is whether the justices sitting as the compensation authority are acting judicially, so as to be subject to the rules as to interest or bias which by English law affect such persons. It is contended by the respondents that the justices are but acting in an administrative capacity, the inference being that in such a capacity their action in like circumstances would not be open to criticism. In my view the objection if well founded would only affect the remedy. The writ of certiorari, which only goes to judicial tribunals, would not be appropriate. In such a case the true remedy would be mandamus to hear and determine according to law. Even administrators have to comport themselves within the bounds of decency. But there appears to be ample authority binding upon us that the justices acting as the compensation authority are a judicial body whose duty is to act judicially. In *Rex* v. *Southampton Justices* (1) the Divisional Court held that the committee of quarter sessions acting as compensation authority are acting in a judicial and not a mere administrative capacity, and issued a mandamus to them to state a case. In the same year in *Dartford Brewery Co.* v. *County of London Quarter Sessions* (2), upon a case stated by the London quarter sessions, the compensation authority for London, the Divisional Court decided that the authority could only act upon evidence given upon oath. Ridley J.

(1) [1906] 1 K. B. 446.

(2) [1906] 1 K. B. 695.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Atkin L.J.

said (1): "In *Rex* v. *Southampton Licensing Justices. Ex parte Cardy* (2), we decided that the quarter sessions acting in this capacity are a judicial body and may state a case. In that decision, to which I was a party, the main point was whether or not the quarter sessions could state a special case, and in arriving at the conclusion that they could we held they were acting judicially, and it was because they were acting judicially that they had jurisdiction to state a case. Since they are acting judicially, the evidence upon which they can act must be evidence given upon oath." In 1912 the Court of Appeal in *Rex* v. *Halifax Justices* (3) granted a writ of prohibition and mandamus to the licensing authority of the county borough of Halifax on the ground that as to one of the justices who had sat when a renewal was refused there was evidence of real likelihood of bias. This case must be discussed later, but it is sufficient to say that a writ of prohibition would not have been granted save to a judicial tribunal. Finally, in *Colchester Brewing Co.* v. *Tendring Justices* (4), the question was raised before the Court of Appeal whether the compensation authority, in that case the committee of quarter sessions, were acting judicially and could only act upon evidence on oath, or were acting administratively and were at liberty to act without evidence on oath and merely upon statements made to them or upon facts within the knowledge of individual justices who were members of the committee. It was decided in favour of the former contention. Swinfen Eady L.J. said (5): "It must now, in my judgment, be considered as settled that a county compensation authority is acting judicially when determining whether the renewal of a licence should be refused, and accordingly can only act upon legal evidence, and may state a case." Bankes L.J. said (6): "Therefore I think we may take it that both in the Divisional Court, and to that extent in the Court of Appeal, the view has been adopted, since the passing of the Act of 1904, that the compensation

(1) [1906] 1 K. B. 701.
(2) [1906] 1 K. B. 446.
(3) 76 J. P. 233.
(4) [1916] 2 K. B. 126.
(5) At p. 132.
(6) At pp. 136, 137.

authority is a judicial authority and must act judicially"; and he repeats: "The result, therefore, is that the compensation authority must be treated as a judicial authority, and it must act judicially, and have the right to state the special case upon which our opinion is asked." No one contends that there is any difference between a compensation authority in a county borough and in a county in this respect, and if he did the matter is concluded against him as far as we are concerned by the decision in *Rex* v. *Halifax Justices* (1), to which I have already referred.

What then, on allegation of interest or bias, is the position of this judicial authority whose duty it is to "act judicially"? Many authorities could be cited, but I take the rule from the decision of the Court of Appeal in *Rex* v. *Sunderland Justices* (2), where a writ of certiorari was issued to quash a decision of the justices sitting as the confirming authority for the grant of a new licence under the Licensing Act of 1872. Sir Archibald Smith M.R. says (3): "It appears to me that, in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case, the decision must really turn on the question of fact, whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biased. If there is such a likelihood, then it is clearly in accordance with natural justice and common sense that the justices likely to be so biased should be incapacitated from sitting." Then he says: "What is the rule on that subject? If the justice acting is pecuniarily interested, there clearly is a bias which disqualifies him. There is, however, no question of any personal pecuniary interest in this case. Then what is the rule with regard to bias in cases other than those in which there is a pecuniary interest on the part of the justice? In *Reg.* v. *Rand* (4), Blackburn J., who delivered the judgment of the Court, after stating that in cases where there was a direct pecuniary interest in the subject of inquiry, however small, that no

(1) 76 J. P. 233.
(2) [1901] 2 K. B. 357.
(3) [1901] 2 K. B. 364, 366.
(4) L. R. 1 Q. B. 230.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Atkin L.J.

doubt disqualified a person from acting as a judge in any matter, but that in the case before the Court there was no such interest in the justices alleged to be biased, proceeded to say: 'But the only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act: and we are not to be understood to say that, where there is a real bias of this sort, this Court would not interfere.'"

The question therefore is: Was there or was there not in the circumstances a real likelihood that there would be bias on the part of some of the justices who were parties to the decision? The justices have to decide judicially whether a particular licence should be renewed upon evidence given upon oath. They have already caused an advocate to be instructed to oppose the renewal and to call evidence in support of the opposition. Can there be two reasonable answers to the question whether there is a real likelihood that they would be biased in favour of the arguments and evidence which they have caused to be adduced and in favour of the decision which they have retained an advocate to support? In these conditions it appears to me that justice is mocked, when justices affect to be applying a judicial mind to the evidence then produced before them.

It is said, however, that the provisions of the Licensing Act of 1904 and the Consolidation Act of 1910, which supersedes it, are such that the ordinary rules as to interest are excluded when justices sit judicially as the confirming authority. I am still in doubt whether the contention is that short of pecuniary interest they may be as biased as they please, or that a likelihood of some degree of bias in excess of that here proved may still disqualify. If the latter, I confess myself unable to imagine in practice the point at which the judicial mind of the justice must really swing to the true north. There can be no doubt that members of the

renewal authority may sit upon the compensation authority. Why not? It is every-day practice for members of a committee to sit upon the body which has to consider the committee's report. This is precisely the position in *Akkersdyk's* case. (1) There the London County Council had sat to determine whether a music and dancing licence should be renewed to the applicant. In pursuance of their powers, such applications are referred in the first instance to a licensing committee, whose report comes up for final determination before the whole council. Certain members of the council had sat upon the licensing committee who had refused the application for a renewal. On the application coming before the council the members in question who had voted against the licence on the committee were represented before the council by a solicitor, who opposed the granting of the licence. The licence was refused by the council. The members in question did not vote in the council, though they were present. The Divisional Court granted a mandamus to the council to hear and determine the application according to law. In that case is every element of the present case. A preliminary determination by a committee, the right of the members of the committee to sit on the council, the right of members of the committee to appear by counsel to oppose the renewal, the finding that the council is acting judicially, and the consequent, and, as I think, inevitable conclusion, that such members appearing by counsel cannot sit at the hearing, and that if they do the decision is null and void, even though, as in that case, they do not vote. A. L. Smith J., in giving the decision of Lord Coleridge C.J. and himself, said (2): "In our judgment, the London County Council are adjudicating as to whether a man is or is not to be deprived of his licence; to use the words of Cotton L.J. in *Leeson* v. *General Council of Medical Education* (3): 'Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.' In our judgment, when so acting, they are not emancipated from the

(1) [1892] 1 Q. B. 190. (2) [1892] 1 Q. B. 195.
(3) 43 Ch. D. 366, 379.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Atkin L.J.

ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence. It is conceded by Mr. Poland that, if the London County Council adjudicated in a matter of a music and dancing licence against an applicant without hearing him, such an adjudication could not stand. He also admitted that, if any of the council adjudicating had a pecuniary interest in the subject matter, such adjudication also could not stand. Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote a passage from the judgment of Cotton L.J. in the case above named, in which he says: 'Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint on which the order is made.'" I see no reason for overruling this case, as we must do if the decision below is to stand, and it appears to me to govern the present case. The decision is in fact approved by the Court of Appeal in *Royal Aquarium Society* v. *Parkinson* (1), though the Court of Appeal were of opinion that the London County Council in licensing matters were not a court so as to clothe its members with absolute privilege. Lord Esher M.R. says (2): "With regard to the case of *Reg.* v. *London County Council. Ex parte Akkersdyk* (3), I do not in any way differ from the decision in that case. The rule applied in that case may be thus stated: Wherever any person has conferred upon him an authority to decide upon a matter affecting another, which he is bound to exercise fairly and impartially, he must act according to the rules of reason and justice. Therefore, he cannot at the same time act as accuser and judge." Fry L.J. says (4): "With regard to *Akkersdyk's* case (3), that case proceeded on the view that the county council were bound to act judicially in the sense which I have already explained

(1) [1892] 1 Q. B. 431.
(2) Ibid. 445.
(3) [1892] 1 Q. B. 190.
(4) [1892] 1 Q. B. 450.

—viz., that they were bound to act fairly and impartially. It is not fair that the same person should act as accuser and also as judge. That case did not decide that the county council was a Court." And Lopes L.J. says: (1) "With regard to *Akkersdyk's* case (2), I do not think that the decision in that case has any application to the present. That case proceeded on the principle that no person who is bound to act fairly in respect of a matter can act as an accuser and also as a judge at the same time."

So far as the applicant's objection is based upon members of the renewal authority sitting upon the compensation authority, it appears to me to go too far. But the fact that it is permitted seems to be no reason for "emancipating such persons from the ordinary principles upon which justice is administered in this kingdom," to quote A. L. Smith J. (3) As was pointed out by Bankes L.J. in *Colchester Brewing Co.* v. *Tendring Justices* (4), the position as presented to the renewal authority and to the compensation authority is not the same. There seems to be no reason why a person who voted in the renewal body to refer a licence should not be capable of exercising an independent judgment when he has to come to a final decision on the compensation authority on what may be new arguments and new evidence. I do not, however, read the sections as giving the justices a licence to be biased. That the ordinary disqualification for bias still attaches to the justices members of the compensation authority is established by the decision of the Court of Appeal in *Rex* v. *Halifax Justices.* (5) Writs of prohibition and mandamus went to the compensation authority of the county borough of Halifax upon it being proved to the satisfaction of the Court, by the publication of a letter after the decision, that there was a real likelihood that the justice writing it had been biased. The decision is that of Vaughan Williams and Farwell L.JJ., Kennedy L.J. dissenting. The dissent, however, was only on the question of the construction

(1) [1892] 1 Q. B. 455.
(2) [1892] 1 Q. B. 190.
(3) [1892] 1 Q. B. 195.
(4) [1916] 2 K. B. 126, 137.
(5) 76 J. P. 233.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Atkin L.J.

of the letter, and the judgment proceeds upon the ground that the ordinary rules as to bias apply. Vaughan Williams L.J. says (1) : " If there was a probability of bias, such a probability as the Court ordinarily acts upon in these cases, you do not inquire . . . . whether he was in fact biased. . . . . We have to consider the question whether there was such a prima facie probability of bias in the case of a gentleman taking the views that are expressed in this letter that we ought not to allow the decision to be effective."

The rules as to bias therefore apply, but you are not to infer a probability of bias from the mere fact that a member of the renewal authority has sat in the particular case on the compensation authority. This seems to me to be the decision in *Rex* v. *Cheshire Justices* (2), so much relied on by the respondents.

It is said, however, that the Licensing Act, s. 19, recognizes the licensing justices (the renewal authority) as being persons who may appear to the compensation authority to be interested in the question of the renewal of the licence (as they certainly may be), and permits the compensation authority to give the licensing justices an opportunity of being heard, which must mean by counsel or solicitor, which is true, and therefore permits the justices who have been heard by counsel to oppose the licence to sit upon the determination of that very question, which appears to be a non sequitur. I see nothing to indicate that if the persons who exercise the powers mentioned in the section so act in circumstances which show a likelihood of bias they are exempt from the consequences. If you are members of the renewal authority you may sit on the compensation authority ; if you are members of the renewal authority you may be heard by counsel ; but if you accept the latter position you will find yourself in a difficulty in also trying to accept the former position. It seems, with respect, mistaken to suppose that because the licensing justices—i.e., the renewal authority—may appear by counsel and so resolve, all the members of the renewal authority are ipso facto disqualified. The objection

(1) 76 J. P. 234, col. 3.

(2) [1906] 1 K. B. 362.

on this score can only apply to those members who in fact are parties to the decision to employ counsel or advocate. It would not apply to a member who opposed the decision or who was absent. The justices are not a corporate body, nor do they carry on business in a firm name, nor are they, like partners, agents to bind the others. Those who instruct the solicitor are alone responsible for the retainer, though the solicitor may be entitled to say he appears for the justices if in fact the decision is that of a majority at a meeting. To decide therefore that the justices in this case who gave the instructions to oppose the renewal were disqualified will in no substantial way infringe upon the policy and liberties of the Licensing Act.

It is said, however, that the case of *Rex* v. *Cheshire Justices* (1) decided that the justices might instruct counsel to oppose the licence and yet sit. This is a mistake. In that case the justice complained of was no party to the instruction of counsel. If he had been, Lord Alverstone C.J. seems to indicate that he would have been disqualified; Darling J., I think, suggests that he would not, but I am not clear. In any case the point clearly did not arise and was not in fact decided. It should be noted that there are many cases where there is express statutory authority for justices to sit where otherwise objection might possibly be taken—e.g., the Public Health Act, 1875, s. 258, and the Municipal Corporation Act, 1882, s. 158, empowering justices members of a municipal or local authority to sit on questions arising under the statutes. Nevertheless, proof of a likelihood of actual bias, such as being party to the actual decision to prosecute, will disqualify: see *Reg.* v. *Lee.* (2)

It appears, therefore, that the English cases support the view that a justice is disqualified from sitting on the compention authority to decide whether a licence shall be renewed where he has caused solicitor or counsel to be instructed to support or oppose the application on which the justice has to decide. It was indeed suggested here, and I am not sure that the Lord Chief Justice did not so hold, though he assumed

(1) [1906] 1 K. B. 362. (2) 9 Q. B. D. 394.

C. A. 1925

REX v. BATH COMPENSATION AUTHORITY.

Atkin L.J.

the opposite for the purpose of his decision, that the three justices in question did not instruct Mr. Withy. Having passed the resolution, they left further developments to the experienced hands of that gentleman. The resolution is that the clerk is instructed to instruct Mr. Withy. How there can be any distinction between instructing an advocate and instructing the clerk to instruct the advocate I cannot imagine. The substance and the form of justice are outraged alike in either case.

The only case that points to the conclusion that in licensing matters the justices may instruct counsel to support a particular decision and yet sit without disqualification is the Irish case: *Rex* v. *Dublin Justices.* (1) In that case it is plain from the facts that none of the justices in question had in fact taken part in causing counsel to be instructed. Palles C.B. nevertheless assumed for his decision that one of them had and still held that there was no disqualification. It is plain, therefore, that the decision is but a dictum, and, with respect for so great an authority, is unfounded. It professes to be based upon a consideration of the reasoning in *Rex* v. *Howard* (2), and appears to misunderstand the procedure which was the subject of that case. There the justices had adopted the ordinary procedure of causing notice of objection to be given to the renewal of all the licences which came up for renewal at the general licensing meeting. This is the procedure recognized by the Act as a preliminary to the decision by the justices at the adjourned meeting, which is made on evidence given on oath. It bears no kind of resemblance to instructions to counsel to oppose a particular licence. In the Irish case I prefer the dissenting judgment of Plunket Barton J. It is said, however, how unsubstantial is this objection, for how much to the advantage of the applicant is it that the justices should come out into the open and the applicant be made aware of what he has to meet. If this means that without the intervention of the advocate the justices would be likely to decide upon evidence not given publicly on oath and would

(1) [1904] 2 I. R. 75. (2) [1902] 2 K. B. 363.

not bring a judicial mind to the particular issue before them, I agree that it is better that the justices should employ an advocate. But I see no reason for limiting the universal rule by making the assumption that in licensing applications the justices will commit a breach of their duty and not act judicially. If it is better that the justices should appear by counsel, it is still better that if they do they should not sit to decide whether their counsel is right or wrong.

The result, in my opinion, is that the authorities show that even in such controversial matters as licensing questions where the justices have to act judicially they are not exempt from the ordinary rules of English justice. Licensing justice on occasions has been suspect. This is licensed injustice, and I deplore the fact that the licence is granted by the Court of King's Bench and this Court, to whom and to whose predecessors has been entrusted the duty to control the aberrations of lower tribunals and to maintain the measured standards of English justice. The object of the rule involved in this case is not merely that the scales be held even; it is also that they may not appear to be inclined. For these reasons I think that the applicants have established their case, and that this appeal should be allowed, the rule made absolute and the order referred to quashed.

Appeal dismissed.

Solicitors for the appellants: *Godden, Holme & Ward, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

Solicitors for the respondents: *Withy & King, Bath.*

J. F. C.

1925
Feb. 11;
March 5.

WEBER *v.* BIRKETT.

[1924. W. 664.]

Defamation—Slander and Libel—Separate Causes of Action—Payment of Money into Court in respect of each Cause of Action—Verdict for One Sum—Form of Apology.

The plaintiff sued the defendant for damages (1.) for slander and (2.) for libel, both causes of action arising out of the same matter. The defendant pleaded an apology, published after the commencement of the action, and paid into Court 105*l.* in respect of the slander and 105*l.* in respect of the libel. In the apology, which was read to the jury, the defendant, after expressing regret for, and withdrawing, any statement reflecting upon the plaintiff, stated that he had paid a sum of money into Court (but not stating the amount) as the best amends he could make. At the trial, the jury, although directed to find two separate sums of damages, one in respect of the slander and the other in respect of the libel, found a single sum of 200*l.* as damages, and on being asked whether they meant that sum to be equally divided—100*l.* for the slander and 100*l.* for the libel—said that that was not what they meant, but that they were unable to assess a separate sum in respect of each cause of action:—

Held, that the jury's finding was not a valid verdict, and therefore that judgment could not be entered thereon.

Form of apology disapproved.

Bourke v. *Lloyd* (1842) 10 M. & W. 550 and *Kilburn* v. *Kilburn* (1845) 13 M. & W. 671 applied.

Further consideration by Lord Hewart C.J. of an action tried with a special jury.

The plaintiff sued the defendant in one and the same action for damages for slander and also for damages for libel. He further claimed an injunction restraining the defendant from further publishing the said or similar libels or slanders. The slander complained of was uttered by the defendant on Wednesday, February 6, 1924, and the libel complained of, which arose out of the same matter as the alleged slander, was published at the instigation of the defendant in a newspaper dated February 7, 1924.

By his defence the defendant pleaded an apology, published in a local newspaper, after the commencement of the action, and paid into Court 105*l.* in respect of the slander and 105*l.* in respect of the libel, and said that these sums were sufficient

to satisfy the plaintiff's claims. The apology was in these terms :—

"Apology.

"I Robert Birkett . . . . desire to express my sincere regret for expressions used by me concerning William Valentine Weber in the course of a speech at the opening of the electric lighting installation, a report of which was published in the Southend Standard.

I desire it to be clearly understood that there is no foundation in fact for any imputation which my words conveyed and I beg to withdraw without reserve any statement reflecting upon him, and to tender him this apology together with a sum of money which I have paid into Court in an action which he has commenced against me, as the best amends I can make for any injury he may have suffered."

At the trial, in the course of which the above apology was read, the jury were asked by counsel on both sides, and were directed by the Lord Chief Justice, to find two separate sums of damages, one in respect of the slander and the other in respect of the libel. The jury, however, found a single sum of 200*l.* and said, and reiterated, that they were unable to discriminate. The Lord Chief Justice asked them whether by that statement they meant that in their opinion the sum of 200*l.* ought to be equally divided—100*l.* as damages in respect of the slander and 100*l.* as damages in respect of the libel. They answered that that was not what they meant; what they meant was that they could not discriminate and could not assess a separate sum in respect of each cause of action.

Each party asked for judgment.

Charles K.C. and *F. Hinde* for the plaintiff.

Sir Henry Maddocks K.C. and *Hon. S. O. Henn Collins* for the defendant.

Cur. adv. vult.

March 5. LORD HEWART C.J. [after stating the facts continued :] It is obvious that the undivided sum of 200*l.*

1925

WEBER v. BIRKETT.

Lord Hewart C.J.

found by the jury is at least theoretically capable of various interpretations. For example, it might be that the jury thought that the real substance of the matter rested in the slander, and that the proper damages for the slander were 198*l.* and for the libel 40*s.* On the other hand, it might be that the jury thought that the real gravamen of the matter was to be found in the libel published and widely circulated in the newspaper, and that 198*l.* should be regarded as damages for the libel and 40*s.* should be regarded as damages for the slander. Between those figures many permutations and combinations might conjecturally be made, and it is not possible for any human being to say what portion of this sum of 200*l.* is certainly to be attributed to the one or to the other cause of action. In those circumstances the question is what is the proper judgment? That question involves the more fundamental one, can there be a judgment at all?

The point is an unusual one, but it has been held that where a case, after issue joined, was referred to an arbitrator and the costs of the cause were to abide the event, the word "event" being construed distributively, the arbitrator must determine each issue, and if any issue was left undetermined the award was bad, and would either be set aside or remitted: see *Ellis* v. *Desilva* (1); *Gisborne* v. *Hart* (2); *Bourke* v. *Lloyd* (3); *Kilburn* v. *Kilburn* (4); *Hunt* v. *Hunt* (5); and *Stonehewer* v. *Farrar.* (6) In *Bourke* v. *Lloyd* (3) Lord Abinger C.B. said this: "This was a rule obtained and argued in Easter term, to set aside an award, and the Court took time to consider, in consequence of a suggestion at the Bar that a case in this Court was at variance with, and had thrown a doubt upon, the propriety of several decisions in which it had been laid down, that where a cause with several issues was referred, the costs of the cause to abide the event, the arbitrator must award specifically on each issue. The case referred to was that of *Duckworth* v. *Harrison* (7); and

(1) (1881) 6 Q. B. D. 521.
(2) (1839) 5 M. & W. 50.
(3) 10 M. & W. 550, 552.
(4) 13 M. & W. 671, 674.
(5) (1836) 5 Dowl. P. C. 442.
(6) (1845) 6 Q. B. 730.
(7) (1838) 4 M. & W. 432.

from the observations said to have been made on that case by Coleridge J. in *England* v. *Davison* (1), it would seem that the learned judge supposed that I had pronounced an opinion favourable to the decision in *Dibben* v. *Marquis of Anglesea* (2), and indeed sustained that decision. This, however, is a misapprehension of what I said. In the case of *Duckworth* v. *Harrison* (3) the costs of the reference and award, not of the action, were to abide the event; and the Court, after some hesitation, held that the meaning of the parties was, that all the costs of the reference and award should abide the event of the award; so that, if the plaintiff succeeded, he should have all those costs, and the defendant, on the other hand, if he succeeded, should have all; and I stated, or certainly meant to state, that if the parties had intended that the costs of the reference and award should be divided, and apportioned to each issue, they should have provided for it in the submission. It is a mistake, therefore, to suppose that the Court intended to confirm the case of *Dibben* v. *Marquis of Anglesea*. (2) We must follow the current of decisions on this subject, by which it is established that if the cause is referred, where several issues are joined, and the costs of the cause are to abide the event, the arbitrator must decide each issue." In like manner, in *Kilburn* v. *Kilburn* (4), Pollock C.B. said: "The cases have laid it down, and we accede to the law as so laid down, that, where the costs of the cause are to abide the event of the award, the award must either dispose specifically of each issue raised on the record, or it must be clearly inferred from it in which way each of these issues has been found, so as to enable the officer to tax the costs for the party in whose favour each issue has been found." These cases and that reasoning seem to me to throw light upon the difficulty which arises in the present case. Here there were two separate and distinct issues: first, whether the sum of 105*l.* was or was not sufficient to satisfy the claim in respect of the slander, and, secondly, whether the sum of 105*l.* was or was not sufficient to satisfy

(1) (1841) 9 Dowl. P. C. 1052.
(2) (1834) 2 Cr. & M. 722.
(3) (1838) 4 M. & W. 432.
(4) 13 M. & W. 671, 674.

1925

WEBER v. BIRKETT.

Lord Hewart C.J.

the claim in respect of the libel. A verdict on each of these issues is necessary in order that the proper judgment may be directed and the liability for costs determined. The jury, I think, in substance, said that they were unable to agree on either of those issues, and their finding in favour of the plaintiff for 200*l.* in all is not, in my opinion, a valid verdict. The effect seems to me to be the same as if the jury had said that they were unable to agree upon a verdict. It is true, no doubt, that a jury is entitled in a proper case to return what is called a general verdict. But that means a verdict covering the whole extent of the genus; it does not mean mixing up one genus with a different genus. That I think is what has been done here. It was urged that at any rate there might and ought to be in this case, as the matter stands, judgment for the plaintiff for an injunction. But in my opinion, regard being had to all the circumstances, this is not a case in which an injunction should be granted, and I should be sorry to fasten upon a claim for an injunction as a mode of cutting the Gordian knot which the finding of the jury has created. It follows that this so-called verdict is not a verdict; the jury have in effect disagreed, and the case must therefore be re-entered if the plaintiff desires.

I desire to add one remark upon the form of the apology in this case and the matters which arose in connection with it. Reference was made during the argument to a form which appears in Mr. Blake Odgers' treatise on Libel and Slander, 5th ed., p. 785. I have looked at the form of defence and apology there given, in which it is stated in the apology that money has been paid into Court and the amount paid in is mentioned, and I observe that the learned editors add the following footnote: "We doubt whether such a defence as this is strictly permissible; but it is not embarrassing; and we do not see that it is otherwise objectionable. It may be urged that the fact that the defendant has apologized since action is neither matter of defence nor a topic within the scope of Order XXXVI., r. 37; it is only ground for a notice under s. 1 of Lord Campbell's Act. But the above pleading passed muster, and the jury, at the trial, found the apology

1925

WEBER v. BIRKETT.

Lord Hewart C.J.

sufficient." To say that the form there given "passed muster" is a very different thing from saying that it is one to be recommended. I do not think that the learned editors' reference to the form as having "passed muster" has any relation to the rule forbidding communication to the jury of the fact that money has been paid into Court or of the amount paid in. I think that what the editors were doubting was whether the fact that the apology had been published after the commencement of the action could properly be pleaded at all.

In the result it is not possible for me as the matter stands to give judgment in this case.

Solicitors for plaintiff: *Bentley & Jenkins, for R. H. Thurlow Baker, Southend-on-Sea.*

Solicitors for defendant: *Cunliffe, Blake & Mossman, for Tolhursts & Cozens, Southend-on-Sea.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.

1924

Nov. 12.

RICKETTS *v.* COLQUHOUN (INSPECTOR OF TAXES).

Revenue—Income Tax—Office or Employment of Profit—Office of Recorder—Emoluments of Office—Expenses "wholly, exclusively, and necessarily incurred and defrayed" in the performance of Duties of Office—Travelling and Hotel Expenses—Deduction—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 9.

The Recorder of a provincial borough, who was a barrister residing and practising in London, claimed to deduct from the amount at which the emoluments of his office had been assessed for the purposes of income tax under Sch. E of the Income Tax Act, 1918, certain travelling expenses incurred by him in travelling from London to the borough and back, and certain hotel expenses incurred while in the borough:—

Held (by Pollock M.R. and Scrutton L.J.; Warrington L.J. dissenting), that the travelling expenses were attributable to the exercise by the Recorder of his own volition in choosing to reside and practise in London, and were not expenses which he was "necessarily obliged" to incur and defray in the performance of his duties, nor were any of the expenses money which he was "necessarily obliged" to expend "wholly, exclusively, and necessarily in the performance" of his duties,

C. A.
1924
RICKETTS
v.
COLQUHOUN.

within the meaning of r. 9 of Sch. E; and that, therefore, he was not entitled to deduct the expenses in question from the amount of his assessment.

Decision of Rowlatt J. [1924] 2 K. B. 347 affirmed.

APPEAL from the decision of Rowlatt J. (1), on a case stated by the General Commissioners of Income Tax, to the effect that the appellant, the Recorder of Portsmouth, was not entitled to deduct from the emoluments of his office, assessed at 250*l.*, a sum of 13*l.* 5*s.* in respect of travelling and hotel expenses, incurred by him in relation to the performance of the duties of his office as Recorder.

The appellant, Mr. G. W. Ricketts, had been appointed to and held his office as Recorder of Portsmouth under the provisions of the Municipal Corporations Act, 1882. At the time of his appointment he was, and had ever since been, a practising member of the Bar residing in London and carrying on his profession at chambers in the Temple. Under the provisions of the Act, he was required to hold once in every quarter of a year a Court of quarter sessions in and for the borough, and it was necessary for him to travel to Portsmouth four times in every year in order to hold his Court there, and he claimed to deduct from the assessment upon him of 250*l.* certain sums on account of expenses incurred or to be incurred by him in the year of assessment, including (inter alia) a sum of 8*l.* 5*s.* in respect of travelling expenses from London to Portsmouth and back, and a sum of 5*l.* in respect of hotel expenses at Portsmouth. These two sums, amounting in the aggregate to 13*l.* 5*s.*, formed the subject matter of this appeal.

Rowlatt J. decided (1) that Mr. Ricketts was not entitled to deduct the expenses in question, under r. 9 of Sch. E, as claimed by him, and from that decision Mr. Ricketts now appealed. The appeal was heard on November 12, 1924.

Sir John Simon K.C., *Konstam K.C.* and *W. Allen* for the appellant. Rule 9 (2) of Sch. E of the Income Tax Act,

(1) [1924] 2 K. B. 347.

(2) Rule 9 provides: "If the holder of an office or employment of profit is necessarily obliged to incur

1918, allows the deduction of expenses by the holder of an office where in the performance of his duties he is necessarily obliged to incur and defray expenses of travelling or otherwise to expend money wholly, exclusively, and necessarily in the performance of these duties. The test required by the rule is a test not to be applied in the abstract, but to each individual concrete case. The question is whether in the case of this particular Recorder he is in the circumstances necessarily obliged to incur this expenditure. The test to be applied is not the same as if he lived at or near Portsmouth. He incurs no expenditure when he is actually in Court performing his duties, and the phrase " in the performance of his duties " must apply to expenditure incurred by him at times other than those during which he sits in Court. The Commissioners did not look at this question from the right angle.

The words of the rule " or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties " are wide words, and we rely on them, and also on the first few words of the rule, " If the holder of an office," which show that the rule is personal to the individual holder and not merely to the nature of the office.

The Commissioners relied on the cases of *Cook* v. *Knott* (1) and *Revell* v. *Directors of Elworthy Bros. & Co.* (2), but neither of those cases was argued, and they only go to show that claims for deductions cannot be carried too far.

There is no analogy between a Recorder and the holder of the directorship of a company. The Recorder holds an office which by statute requires continuous duties and attention. The director is under no obligation to go to meetings, and his office only calls for performance of duties while he is at a meeting.

Sir Patrick Hastings A.-G. and *R. P. Hills* for the respondent.

and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

(1) (1887) 2 Tax Cas. 246.

(2) (1890) 3 Tax Cas. 12.

C. A. 1924

RICKETTS v. COLQUHOUN.

The appellant is not "necessarily obliged" to incur these expenses. There is no requirement obliging a Recorder to be a practising barrister, and there is no reason why, although he is a practising barrister, he should be necessarily obliged to incur them. Those words do not apply to a barrister who chooses to go on practising his profession in London. In travelling to and fro he is not travelling in the performance of his duties within the earlier part of r. 9. Hotel expenses come under the later part of the rule, but they are incurred because he does not choose to live in the neighbourhood. *Bowers* v. *Harding* (1) illustrates the principles applicable to cases of this description. *Cook* v. *Knott* (2) was followed in *Friedson* v. *Glyn-Thomas*. (3)

Sir John Simon K.C. in reply. In computing profits under Sch. D deductions are allowed by r. 3 for expenses "wholly and exclusively" laid out for the purposes of the employment or profession, and form some guide to the similar words, "wholly, exclusively and necessarily," occur in r. 9 of Sch. E. The hotel expenses come within the latter words, and so would the surplus cost of luncheon and dinner over and above the ordinary cost of the same. "Necessarily incurred in the performance" of his duties would apply to these, and also to a case where a Recorder lived quite close to the place where he had to perform his duties—e.g., the Recorder of London—and they would apply also to a judge of the High Court leaving London to go, for instance, the Northern Circuit. The real question is, what is reasonable in each particular case, and I submit that the Commissioners have misdirected themselves.

POLLOCK M.R. stated the facts and continued: This appeal is brought in order to have a decision upon a matter which is, if not of general, at any rate of somewhat wide application, and which raises the question whether, where a Recorder or officer of the law, or it may be of other professions, holds an office which involves him in travelling and hotel expenses, those travelling and hotel expenses are

(1) [1891] 1 Q. B. 560. (2) (1887) 2 Tax Cas. 246.
(3) [1922] W. N. 251.

deductions which can be made from the salary in ascertaining the amount on which the holder of the office is to be taxed for income tax. No doubt the point is of importance. It is not without some authority, though the authority may not be very recent, but at any rate the point is now raised, and this Court has to decide it.

I wish to make it quite plain at the outset of my judgment that what we have to determine here is the right interpretation of the words of a statute—the narrow words of a statute, in contradistinction to a general and loose, though not inaccurate, description of the purpose of this expenditure. Mr. Ricketts and other Recorders might well say that it costs them so much—in this present case 13*l.* 5*s.*—for travelling and hotel expenses as a Recorder, and certainly if in any summary of accounts 13*l.* 5*s.* was put down as expenses of a Recordership no one would complain that there was inaccuracy in such a description. But we have not to consider whether or not in common parlance these sums expended in that way are properly described; we have to determine whether this particular expenditure comes within the limits allowed by the statute.

Next, we have not to determine or to consider this case as if it fell under Sch. D of the Income Tax Acts. Every one knows that Sch. D is the Schedule under which the profits and gains of a profession or trade fall to be taxed, and in the case of a profession or trade, and in ascertaining the profits or gains to be charged, it is laid down in the third rule of Sch. D that there is no right to deduct any sum "in respect of any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation." In other words, putting that affirmatively, it is clear that in order to justify a deduction when you are ascertaining the profits of a trade, profession, employment or vocation, it is necessary to show that the money which has been laid out was laid out and expended wholly and exclusively for the purposes of the trade or profession. But, as I have said, we are not discussing the matter under Sch. D, which, although it includes those

C. A. 1924

RICKETTS v. COLQUHOUN.

Pollock M.R.

words, "wholly and exclusively," may broadly be taken to allow a wider range of deductions than the particular case that is before us.

Mr. Ricketts is a Recorder. He is therefore the holder of an office, and he receives as Recorder a salary. The Income Tax Act provides that holders of public offices, which are defined in the Act, shall be taxed, not under Sch. D, but under Sch. E, and the rules applicable to Sch. E are severable, but the tax is in respect of all salaries, fees, wages, perquisites and profits received from the offices, and the tax is to be paid in respect of all public offices. The Recordership falls within that, and therefore under the charging section there is to be paid, prima facie in respect of the salary received, a tax upon that salary. But now r. 9 comes into play, and it begins, "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof"—and then follow other words to which I need not refer—"then there may be deducted from the emoluments to be assessed the expenses so necessarily incurred or defrayed." The qualifications for a Recorder are now contained in ss. 162 to 166 inclusive of the Municipal Corporations Act, 1882, and it is laid down in those sections that a Recorder must be a barrister of five years' standing, and I agree with the learned judge who made this observation, that in nine cases out of ten you will probably find that the barrister who holds the position of Recorder does live in London in order that he may engage in his profession as a barrister, and has to travel from London to perform his duties. But for the purposes of income tax the matter comes before us at a later stage. It only comes before us if and when a barrister is the holder of an office. Whether or not the barrister shall accept the office, whether he is under particular disabilities, which he would have to overcome if he were to discharge the duties of the office, and to hold it—all those matters are for him to determine if and when the offer is made to him. More than that, the Home Secretary may, before he advises His Majesty to appoint him, no doubt take into consideration any difficulties of distance

from his residence and the like; but, as I say, the matter comes before us at a time when this particular person is the holder of an office. Next, it is of importance to remember that this rule applies not merely to Recorders, but also to all holders of any office or employment which falls to be estimated for income tax under Sch. E. It is very easy by a general description of the facts to suppose that a hard case has arisen, but it is the duty of this Court to adhere closely and accurately to the actual words of r. 9, which are of general application to all holders of offices which come within its ambit.

At the outset, therefore, you have to find whether the holder is necessarily obliged to incur and defray expenses out of his emoluments, and I attach importance to those words "necessarily obliged," because I think they are to be read as meaning that where an obligation is imposed upon the holder of the office which ex necessitate of the office compels him to make outlays it is in those cases, and after you have fulfilled that condition, that you first consider what is the expenditure which it is possible may be deducted. Then the rule goes on, and Sir John Simon has pointed out to us, rightly I think, that it contains certainly two limbs, if not three. The first expenditure that is dealt with is that relating to the expenses of travelling in the performance of the duties of the office or employment. Now that I think means—that where the office is of such a nature that in order to execute its duties its holder has to travel from place to place, has, in other words, itinerant duties, there the expenses of such travelling, necessary to and involved in the work attached to the office, are and may be allowed as an expense, the obligation of which is necessarily incurred by the holder of the office. Upon consideration the travelling, which is in question in this case, is not of that nature. The duties of a Recorder are to sit and to hear the cases that come before him. A Recorder has, as far as I know, in this case if not in all cases, no duties which would take him from one Court to another in the capacity of the particular Recordership which he holds. One man may hold two

C. A. 1924

RICKETTS v. COLQUHOUN.

Pollock M.R.

Recorderships, but so far as I know there is no Recordership which per se involves sitting in two places consecutively. Unless that were so, I do not think it would be possible to say that there were any expenses of travelling from place to place involved in the performance of the duties of the office, but I want to speak quite generally. I think that the first expenses which are thought of in the section are those which are necessarily incurred, because the performance of the duties of the office compels the holder to travel from place to place. Next, or perhaps a part of this first limb, is the cost of keeping and maintaining a horse to enable him to perform the same. No doubt that is a survival from the days when a very ordinary method of passing from place to place in the country was upon a horse, but the purpose for which the horse is kept and maintained seems to me to be for the purpose of performing the same duties incidental to the office as are indicated by the earlier words, "expenses of travelling." I think that the maintenance of the horse is only referred to in order that the section may not overlook a particular method of travelling more common in 1842 than at the present time, but at the same time making it quite clear that mechanical traffic even at the present day is not to exclude a method of travelling, which obtained in the days of our fathers or grandfathers much more generally than it does to-day. That then seems to be the first limb—travelling necessitated for the purpose of the fulfilment of the duty of the office.

Then we come to the second limb, which is of a wider nature. It does not relate wholly or exclusively to travelling, nor does it relate wholly or exclusively to anything; what it does say is this: "Where the holder of an office is necessarily obliged to incur and defray out of his emoluments or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties," then such expenses so necessarily incurred and defrayed may be deducted. I have already said that I think the first two lines of the rule must first of all be fulfilled; there must be something in respect of which there is an obligation, and a necessary

obligation, which causes expense. Then in this last line we have " wholly, exclusively, and necessarily in the performance of the said duties." There are a great number of things which loosely may be said to be necessary, which may be said to be for the purpose of the performance of the duties, but it appears to me that these three adverbs have been introduced in order to cut down and limit in the most stringent way the application of this rule. I will now deal with the two items which are open from this point of view. It is possible that there might be travelling which might fall within this rule. There might be hotel expenses possibly in certain particular cases, but can it be said of this travelling that it was carried out wholly, exclusively and necessarily in the performance of the said duties ? It seems to me that this particular travelling from London to Portsmouth and from Portsmouth to London depends on the Recorder's own volition. It is for the purpose of his getting to the place where he has to perform his duties. It is not incurred in the course of the performance of his duties ; it is because of the fact that as the holder of an office he has preferred to live where he does. His particular residence will not make any difference upon the performance of his duties or the nature of his office or anything else ; he will live where he pleases, and he will perform the duties of Recorder according to his ability, whatever place he resides at, and from or to whatever place of residence he may at the time hold.

Then I come to the hotel expenses, which I confess have given me more exercise of thought. It may be said, and I think loosely would be said, that when Mr. Ricketts stays at Portsmouth he stays there for the purpose of his Recordership, but that, as I have pointed out, does not determine the question. Can it be said that you can properly and accurately attribute to that expenditure that it is money which has been exclusively expended in the performance of his duties, and not for the purpose of the necessity, which is laid upon us all, of rest and sleep ? Can it be said with regard to some portion of it that you might attribute it towards the extra cost of

C. A. 1924

RICKETTS v. COLQUHOUN.

Pollock M.R.

being at Portsmouth—what of that? There you get up against the word "wholly," and next you have the word "necessarily." I cannot think that the hotel expenditure can properly be held to be wholly, exclusively, and necessarily expended in the performance, which I should have thought meant in the course of the performance of his duties.

There are two cases which have been referred to, or rather one, because *Cook* v. *Knott* (1) was followed in the second case, but there is good sense in *Cook* v. *Knott* (1), and at least it is shown what may be the danger of giving a wide or loose interpretation to this rule. There is another case of *Bowers* v. *Harding* (2), which also illustrates what may be the difficulties which may arise if a loose interpretation is given to the rule. I will not refer to the exact words or passages in the judgments. They are all illustrations of what it has from time to time been attempted unsuccessfully to bring within the ambit of the words of this rule. It appears to me that, bearing in mind the number of different offices to which this rule applies, its terms have been drawn with the utmost care to cut down any deductions within the narrowest limits and to confine them to something which is incurred, and necessarily incurred, in the performance of the duties.

For the reasons which I have given, interpreting the rule as I do in the narrow sense, I do not think that it is possible to say that either the travelling or the hotel expenses fulfil what are really the five qualifications which are laid down in the rule which must be fulfilled if the deduction is to be allowed. The intention of the Legislature was, I am sure, to make the deduction narrow, and, inasmuch as this emolument of an office falls to be taxed under Sch. E, unless r. 9 applies, it is of no moment to say that had it been taxable under Sch. D something else might have been deducted.

For the reasons that I have given I have come to the conclusion that Rowlatt J. was right in supporting the view of the Commissioners of Income Tax, and that the appeal must be dismissed with costs.

(1) 2 Tax Cas. 246. (2) [1891] 1 Q. B. 560.

WARRINGTON L.J. I regret that I cannot take the same view as my two brethren. The appeal is from a decision of the Commissioners, affirmed by a judgment of Rowlatt J., and the grounds of the Commissioners' decision and that of Rowlatt J. in reference to the only two items which are really in question is that they are items which, to use the expression used by Pollock B. in the case of *Cook* v. *Knott* (1), to which I will refer presently, are not expenses incurred in the performance of the appellant's duties, and that under no circumstances can expenses of that nature, therefore, be allowed under r. 9 of Sch. E of the Income Tax Act, which is the rule in question. With all respect I take a different view. It seems to me that both the travelling expenses to and from, and the expenses of living incurred at, the place where the duties have to be performed may be expenses necessarily incurred in the performance of the duties.

The facts are these: the appellant is the Recorder of Portsmouth. It is his duty under the statute under which he was appointed to hold quarter sessions once a quarter, or oftener if necessary, in the borough of Portsmouth. He, therefore, cannot perform his duty unless he is at the time in question in the borough. At the time he was appointed he was, and he is now, a barrister practising in London. He cannot perform his duties under the existing circumstances without travelling from London to Portsmouth. He cannot travel from London to Portsmouth without incurring expense. So with regard to the hotel expenses. If the performance of his duties as Recorder require him to stay over-night at Portsmouth he cannot properly perform those duties without obtaining board and lodging for the night, and unless he be in some exceptional circumstances, he cannot obtain his board and lodging for the night without incurring expense, which he would not otherwise incur. Now I think, and I understand on this the Attorney-General agrees, that the words "necessarily" and "necessary" in the rule do not mean necessary and necessarily in the abstract, but they mean necessary in regard to the circumstances of the

(1) 2 Tax Cas. 246.

C. A. 1924

RICKETTS v. COLQUHOUN.

Warrington L.J.

individual concerned, the holder of the office, and in regard to the ordinary usages of mankind at this time in the history of the world. If that is so, and if he is unable to enter upon the performance of his duties without incurring, under the circumstances in which he is properly situated, the expense of travelling from his home to the borough, and if in the same way there is cast upon him, in order efficiently to perform his duties, extra expense by going to a hotel in Portsmouth, it seems to me that those are expenses incurred in the performance of his duties. He cannot perform his duty without incurring them, and in principle I cannot see the difference between an expense incurred while he is actually performing his duties, and one incurred for the purpose of enabling him to perform his duties. It seems to me, therefore, that if the case were without authority—Rowlatt J. has rested it upon authority—I should be prepared to say that the travelling expenses may be—I do not say that the particular travelling expenses are to be—allowed (that is for the Commissioners to determine), but that there is nothing in the rule which excludes the allowance of the expenses of travelling from the place where the holder of the office in question either performs his ordinary duties, or in which he resides. And, in the same way, if there are other expenses, such as in this case the hotel expenses, if they are necessarily, wholly and exclusively incurred by reason of the fact that without incurring them he cannot perform his duties, then it seems to me that a deduction ought to be allowed in respect of them. I must say just a word in addition about the hotel expenses, because it may be, and I think the Commissioners could quite properly come to the conclusion, that the whole of the hotel expenses could not be said to have been incurred wholly, exclusively, and necessarily in the performance of his duty, but some part of it, which would have to be reasonably ascertained by reasonable men acting with reasonable knowledge of the ordinary affairs of mankind, could easily have been said to have been wholly and exclusively and necessarily incurred in the performance of his duty.

Then just one word about the cases. There is really only

one case which applies to the present case and which can be referred to as an authority, and that is the decision of the Court of Queen's Bench in the case of *Cook* v. *Knott*. (1) The other case of *Revell* v. *Directors of Elworthy Bros. & Co.* (2) simply followed upon *Cook* v. *Knott*. (1) The ground of the decision in *Cook* v. *Knott* (1) was that the travelling expenses there claimed, which were substantially travelling expenses, such as are claimed here, were not incurred in the performance of the duty then in question. Now with all respect to the learned judges who decided that case, I cannot agree, and if the decision rested with me I should say that that case should be overruled. *Revell* v. *Directors of Elworthy Bros. & Co.* (2) simply depends upon that. The other case of *Bowers* v. *Harding* (3) was in my opinion a totally different case. In that case the schoolmaster tried to get allowed as a deduction from his salary the expense of employing a maid to take the place in the house of his wife, and it was decided that that could not be said to be an expense incurred necessarily, wholly, and exclusively in the performance of his duties. It might enable the wife to perform hers, but even then it would not be necessarily incurred, but it could not in any way enable him to perform his, or be an expense incurred therefore in the performance of his duties. With all respect, that case seems to me to have nothing to do with the case before us.

For these reasons I cannot agree with my learned brethren or with Rowlatt J., and if the matter rested with me alone I should say the appeal ought to be allowed and the matter sent back to the Commissioners to examine into the case and determine whether any of those items or what part of them ought to be allowed.

SCRUTTON L.J. This appeal is brought in the interests of a large and important class of judicial officers, the Recorders of Boroughs, and it is desired by the appeal to establish that they have a right to deduct from the salaries that they receive from the corporations of their boroughs their expenses of

(1) 2 Tax Cas. 246. (2) 3 Tax Cas. 12.
(3) [1891] 1 Q. B. 560.

C. A. 1924

RICKETTS v. COLQUHOUN.

Scrutton L.J.

travelling to and from the boroughs in which they exercise judicial functions, and hotel expenses, if any, incurred while they are in their boroughs. But while that is the particular class that are appealing to us, it must be borne in mind that the principle that they ask us to apply affects a very much larger class of persons; it applies to all directors and secretaries of companies, and to all servants of corporations holding offices; and the principles that Sir John Simon and Mr. Konstam have invited us to apply will look quite different if they are put in the form of application to the individual who happens to hold the office of a director, or an individual who happens to hold the office of secretary, or the individual who happens to hold the office of clerk or engineer to a borough corporation. I desire to divest my mind of the glamour that may spread over it if I think only of the august dignity of Recorders; and further I desire to say that the question is not what I should like to do, or what I think would be reasonable to do, or what amendment Parliament might well make in the existing legislation, but the question is simply the interpretation of a statute at present passed to regulate the deductions which may be made from the salaries of offices; on which statute there have been two decisions against the contentions of the appellant, now standing for forty years, which Parliament, on the innumerable occasions on which it has amended the Income Tax Acts, has not thought right to modify.

The rule that I have to consider is this: "If the holder of an office is necessarily obliged to incur and defray out of the emoluments the expenses of travelling in the performance of the duties of the office." I read that, and can only read it myself, as relating to travelling in performing the duties of an office, and I am quite unable to understand how a Recorder is performing the duties of his office when he travels to the place at which alone he can exercise the duties of his office, or away from the place at which he has exercised those duties. He may live 5, 10, 50, 100, or 400 miles from the borough in which he is Recorder, and I personally cannot understand how it is suggested that when, in the case of residence 400 miles

away, he sets out on his journey of 400 miles, he is performing the duties of Recorder. He is travelling to a place where he has to exercise the duties of Recorder, and he is travelling to that place because of personal conditions of his own, which have nothing to do with the duties of Recorder, but are personal matters which he alone controls, and as to which his corporation have nothing whatever to say, so long as he holds his sessions. That seems to me to be the matter which shuts out these expenses from the first part of r. 9. In addition there are the words to which I attach equal importance, though the first words seem to me to be sufficient to shut out the matter—" is necessarily obliged to incur the expense of travelling." Now I read this section as applying to the duties of the office, and not to any circumstance peculiar to the person who is appointed to the office, and which is entirely within his own control. The same remark seems to me to apply to the last part of the section : " money wholly, exclusively, or necessarily expended in the performance of the said duties." Again it appears to me that the money spent on travelling, feeding and sleeping is not wholly and exclusively expended in the performance of the duties of Recorder. Travelling expenses I have no doubt whatever about. The expenses of food and of sleeping stand in a slightly different category. Take, in the case of food, the simplest case of the lunch of the Recorder during the sitting. Whether counsel are quite wise in selecting as an example the lunch of the Recorder of London is a questionable matter ; I was not able myself to picture the Recorder of London going out to lunch from the Old Bailey under the circumstances which we know prevail. But the expenses of lunch of a Recorder are simply those of having his meal ; it may be that his meal costs more because he is sitting as Recorder instead of lunching in his Inn of Court, but to say that the sum he expends is wholly expended in the performance of his duty appears to me to be an impossible reading of the section. If it is said, " Oh, but you need not allow him the whole of his lunch ; find out what lunch he would have if he was not sitting as Recorder, find out what he does spend

C. A. 1924

RICKETTS v. COLQUHOUN.

Scrutton L.J.

on the lunch he does have while sitting as Recorder and allow the margin," it appears to me you are getting into the difficulty that Pollock B. pointed out in *Bowers* v. *Harding* (1), when he said: "If we were to go into these questions with great nicety, we should have to consider the district in which the person lives, the price of meat, and the character of the clothing that he would require, in many places indeed the character of the services and the wages paid to particular servants, and the style in which each person lives, before we could come to any conclusion." That seems to me to be a matter which Parliament did not intend the Commissioners to go into when it used the words, "wholly, exclusively, and necessarily." The question of the hotel accommodation is, perhaps, rather stronger, because it is said, "You would sleep at home; there is your home accommodation available for you; this is entirely separate hotel accommodation." But again it seems to me the question is "wholly, exclusively, and necessarily," and there is nothing in the appointment of Recorder or its duties which necessarily requires the person to live away from the town, and, therefore, which necessarily involves his having a waste bed, so to speak, and a waste expense.

For these reasons it appears to me that if any change is to be made in the deductions allowed from salaries of offices it is Parliament that must do it, and not the Court. The words of the rule appear to me personally to be clear, whatever I might have liked to do if I had a free hand, and I therefore agree with the Master of the Rolls that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Clowes, Hickley & Heaver.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

(1) [1891] 1 Q. B. 560, 564.

R. M.

ROSSITER *v.* LANGLEY.

1925

Feb. 12.

Landlord and Tenant—Rent Restriction—Consent Order for Possession—Subsequent Application by Tenant to vary—Jurisdiction of County Court Judge—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 2.

The county court judge has the same jurisdiction, under s. 5, sub-s. 2, of the Increase of Rent, &c. (Restrictions), Act, 1920, to vary a consent order for possession as he has in the case of such an order made in invitum.

Wellesley v. *White* [1921] 2 K. B. 204 distinguished.

APPEAL from Bristol County Court.

The appellant, Miss Rossiter (the defendant in the county court), was the tenant (called herein "the tenant"), and the respondent, Mr. Zebedee Langley (the plaintiff in the county court), was the landlord (called herein "the landlord"), of a dwelling-house, 367 Bath Road, Brislington, Bristol, at a rent of 17*s.* 4*d.* per week. The landlord in August, 1923, gave the tenant due notice to quit, but the tenant did not give up possession and became the statutory tenant. The landlord subsequently took out a summons in the county court claiming possession of the premises. On December 21, 1923, the landlord by his solicitors and the tenant signed an agreement, whereby the tenant agreed to judgment for possession to be given up on September 29, 1924. This consent was handed to the county court judge, and he entered judgment in its terms. On October 1, 1924, the tenant made an application to the county court for relief under s. 5, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (1) The county court judge, without going into

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 2: "At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any . . . . dwelling-house, or for the ejectment of a tenant therefrom, or in the case of any such order or judgment which has been made or given, whether before or after the passing of this Act, and not executed, at any subsequent time, the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession, for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of

1925

ROSSITER v. LANGLEY.

the merits of the application, held that he had no jurisdiction, because s. 5, sub-s. 2, did not apply where the original order was made by consent, and that he was bound by the decision in *Wellesley* v. *White* (1), and therefore refused the application.

The tenant appealed.

Havers for the tenant. The county court judge had jurisdiction to entertain the application. Sub-s. 2 of s. 5 speaks of "any order," and these words ought to be construed in their ordinary grammatical sense, unless that would lead to some repugnancy. That would not be the case here, therefore the words "any order" include an order by consent. If the judge had entertained the application he would have had to consider the provisions of sub-s. 1 of s. 5 before coming to a decision. It is clear from *Barton* v. *Fincham* (2) that the parties cannot by agreement give courts jurisdiction which the Legislature has enacted they are not to have: per Atkin L.J. (3), and the county court judge can only make an order if the facts set out in s. 5, sub-s. 1, are proved. But that proof may either be by witnesses or by the tenant admitting the facts to save the expense of witnesses. In the latter case the resultant order for possession is not different in kind from one made in invitum. And s. 5, sub-s. 2, says that that order shall be subject to review. In *Wellesley* v. *White* (1), by which the county court judge thought he was bound, the house at the time the parties made their agreement was not within the purview of any Rent Restriction Act, but had come under the Increase of Rent, &c. (Restrictions) Act, 1920, at the time of the application. Therefore the distinction between that case and this is, that in the former the parties at the time they agreed were free to make any agreement they chose, and the court, therefore, would not set it aside; it had become a vested right of the landlord. The parties in the present case could not make any agreement

arrears of rent, rent, or mesne profits and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment."

(1) [1921] 2 K. B. 204.

(2) [1921] 2 K. B. 291.

(3) Ibid. 299.

they chose, but one subject to the provisions of the Act only.

Wethered for the landlord. This case is covered by *Wellesley* v. *White*. (1) The order by consent here was a contract between the parties, the tenant, although admittedly in default, getting her possession extended to September, 1924. What the tenant is asking is that this contract shall be set aside. A contract can only be set aside in equity on the ground of mutual mistake or a unilateral mistake induced by the misrepresentation of the other side. Nothing of the kind is alleged here. Where the order is made in invitum there is, of course, no contract.

SALTER J. This appeal raises a very short point, which is not free from difficulty. It arises in this way. The landlord of these premises, to which the Rent Restriction Acts apply, took proceedings in the county court for the recovery of possession. An agreement was then come to between the parties in the following terms : " We, the undersigned solicitors for the [landlord] and Miss Rossiter [the tenant] hereby agree to judgment for possession of the premises the subject matter of this action, to be given up on September 29, 1924. No costs. Dated this 21st day of December, 1923. (Signed) Veale & Co. G. E. Rossiter." That agreement was handed to the judge, and judgment for possession was entered in accordance with its terms. On October 1, 1924, the tenant applied to the county court judge under s. 5, sub-s. 2, of the Increase of Rent, &c. (Restrictions) Act, 1920, to postpone the above date of possession. The county court judge did not apply his mind to the merits of the application, because he came to the conclusion that he had no jurisdiction to do so, and that s. 5, sub-s. 2, did not apply, because the original order had been made by consent.

Now, sub-s. 2 of s. 5 must be read in its context, and the preceding sub-section, sub-s. 1, is of importance, because it shows the very strong intention of the Legislature, which intention has grown stronger with time, to limit the power of

(1) [1921] 2 K. B. 204.

1925

ROSSITER v. LANGLEY.

Salter J.

the courts to allow the ejectment of tenants. Then comes sub-s. 2, which shows an equally emphatic intention to protect the interests of the smaller classes of tenants, and makes it clear that even where an order for possession has been obtained the tenant is still entitled at any time up to the last moment to go to the county court judge and ask him to exercise his discretion in the tenant's favour. I cannot imagine wider words. [His Lordship read sub-s. 2.] That is obviously a provision intended to be wholly in the interest of and for the protection of the tenant, and to give to the county court judge, who has been invested with a wide discretion in making the order, an equally wide discretion to deal with it up to the last moment. That power was given in express terms. The question is whether we have any warrant to limit that discretion to cases where the original order was not made by consent. In a case of an order by consent all that happens is that the tenant says to the landlord, "I might be able to put difficulties in your way, but if you will let the order stand for a certain time I will not do so." In the absence of authority I should have little doubt that we have no right to limit the discretion of the county court judge. But it is said that there is authority in the case of *Barton* v. *Fincham*. (1) I agree that that case is not by any means conclusive of the present one, but it is a very valuable guide. There the tenant had agreed, in consideration of a money payment by his landlord, to give the latter notice to quit and to yield up possession on a certain date. When that date arrived the tenant refused to give up possession, although she had given notice to quit. Thereupon the landlord brought an action in the county court to recover possession, but was unable to show that any of the circumstances existed which, under s. 5, sub-s. 1, of the Act of 1920, must exist before an order for recovery of possession can be made. The Court of Appeal held that the landlord could not recover possession. That case decided that parties cannot rely on an agreement made after the Act came into operation to increase the powers of the county court under s. 5, sub-s. 1, nor can

(1) [1921] 2 K. B. 291.

1925

ROSSITER v. LANGLEY.

Salter J.

they, in my opinion, by agreement withdraw from the judge the powers given to him by s. 5, sub-s. 2. With regard to *Wellesley* v. *White* (1) I do not think we are necessarily differing from the decision of the Divisional Court in that case. The agreement there was made before the Act of 1920 came into operation, and the application was made under s. 5, sub-s. 3. I think the county court judge, in holding that he had no jurisdiction to consider the application by the tenant, was wrong, and that this appeal should be allowed.

FRASER J. I agree.

Appeal allowed.

Solicitors for appellant: *E. C. Rawlings, Butt & Bowyer, for F. E. C. Habgood, Bristol.*

Solicitors for respondent: *Wilkinson, Bowen, Jackson & Curran, for Veale & Co., Bristol.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.

1925

Feb. 25.

SMITH *v.* MARTIN.

Building Contract—R. I. B. A. Form—Construction of.

The form of building contract issued by the Royal Institute of British Architects provides, by Condition 31 in the Schedule thereto, that should the building owner not pay the builder any sum certified by the architect within the time limited by the contract, the builder is to be at liberty to determine the contract and recover from the building owner payment for all work executed. And Condition 32 provides that in case any difference shall arise between the building owner and the builder as to the construction of the contract or as to any matter arising thereunder, such difference is to be referred to arbitration, but that "such reference . . . . shall not be opened until after the completion of the works."

During the progress of certain works which were being carried out under a building contract in the above form the building owner neglected to pay to the builder a sum certified by the architect within the stipulated time, and thereupon the builder determined the contract under Condition 31. The builder commenced arbitration proceedings while the contract works were still uncompleted, and the arbitrator made

(1) [1921] 2 K. B. 204.

C. A.
1925
SMITH
v.
MARTIN.

an award in his favour for the money due to him under the contract:—

Held, that the words "until after the completion of the works" in Condition 32 meant until after completion of the whole of the works contracted for, and not merely until after completion of so much of the works as the builder was under the circumstances bound to perform; that consequently the arbitration was premature and the arbitrator had no jurisdiction to make the award; or that at all events the validity of the award was sufficiently doubtful to render it improper to enforce it summarily.

APPEAL from Lush J. at chambers.

By a building contract dated January 24, 1924, and made between W. A. Martin and D. Ospalak, the employers, and A. P. Smith, the contractor, it was agreed that the contractor should erect for the employers thirty-six houses at Alperton for the sum of 690*l.* per house. The conditions of the contract were those in the form in general use issued by the Royal Institute of British Architects. (1) The contractor commenced the work, and in the months of April and May the architect complained that certain work done by the contractor was defective, and gave him notice requiring him to rectify it. On May 10 the architect gave the contractor a certificate for 600*l.*, at the same time stating that the certificate was conditional for its efficacy upon previous rectification of the

(1) By Condition 1 in the schedule to the Form of Contract issued by the Royal Institute of British Architects: "Should the employer not pay the contractor any sum certified by the architect within the times respectively named in Clause 30, the contractor shall give written notice to the employer of the non-payment, and should the employer not pay any such sum within the period of —— days from the date of delivery of such notice . . . . the contractor shall be at liberty to determine the contract . . . . and to recover from the employer payment for all work executed."

By Condition 32: "Provided always that in case any dispute or difference shall arise between the employer . . . . and the contractor either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract or as to any matter or thing arising thereunder . . . . or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of ——. Such reference, except on the question of certificate, shall not be opened until after the completion or alleged completion of the works, unless with the written consent of the employer or architect and the contractor."

defective work. The contractor neglected to rectify the defective work, and the employers thereupon refused to pay the amount of the certificate. The contractor then gave the employers notice under Condition 31 requiring them to pay the money, and, on the employers failing to comply with that notice, refused to do any more work and determined the contract. The contractor on August 1 procured an arbitrator to be appointed in the manner provided by Condition 32, and the arbitration was commenced on October 27. On December 12 the arbitrator made his award in favour of the contractor for 1156*l.* 11*s.* 6*d.* The employers refused to pay the amount of the award on the ground that the arbitrator had no jurisdiction, the arbitration proceedings having been commenced before the completion of the works contrary to the provisions of Condition 32, the contractor, on the other hand contending that "the works" were completed so far as under the circumstances he was under any obligation to complete them. On the application of the contractor the Master at chambers made an order for the enforcement of the award summarily under s. 12 of the Arbitration Act, 1889, and on appeal Lush J. affirmed that order.

The employers appealed.

Croom-Johnson for the appellants. The contention of the builder is based upon the assumption that he was justified in putting an end to the contract, notwithstanding that the certificate of the architect was accompanied by a letter stating that it was given conditionally only. Even if the builder's construction of the words "after the completion of the works" in Condition 32 is correct the arbitrator would have no jurisdiction to entertain the reference, unless the builder was justified in determining the contract under Condition 31. The arbitrator has apparently decided that he was so justified, but he was not empowered to do so. Where the right to go to arbitration depends upon the happening of an event the arbitrator cannot adjudicate upon the question whether the event has happened or not. The Court of Appeal so held

C. A. 1925

SMITH v. MARTIN.

in *Pethick Brothers* v. *Metropolitan Water Board.* (1) But even if the builder was justified in determining the contract, still the arbitrator had no jurisdiction, for by Condition 32 the arbitration on such a difference as that in the present case was not to be commenced till after the completion "of the works," by which words are to be understood the whole works contemplated by the contract. The words "the works" occur in almost every condition in the schedule, and, except where they are used to indicate the premises on which the building operations are being carried on, it is in each case clear from the context that they mean the whole of the works contracted for. If then the arbitrator had no jurisdiction the award was a nullity and cannot be enforced at all, either summarily or by action. But in any case there is sufficient doubt about the question to make it improper to enforce it summarily. In *In re Boks & Co. and Peters, Rushton & Co.* (2) Swinfen Eady M.R. said: "It is well settled that the procedure by action upon an award is one that ought to be pursued where the objections raised are such as to render the validity of the award a matter of doubt. . . . . Where there are matters which may gravely affect the validity of the award . . . . no order should be made giving leave to proceed summarily under the award."

R. Fortune for the respondent. The arbitrator has found that the builder lawfully determined the contract, and he was entitled so to find, for by Condition 32 he was given power to decide any question "as to the construction of the contract or as to any matter or thing arising thereunder." The question whether the contract was properly determined was necessarily a matter arising under the contract. There must be some limitation to the wide general rule that is said to have been laid down in *Pethick Brothers* v. *Metropolitan Water Board.* (1) Then if the contract was properly determined the builder was under no obligation to proceed further with the works, and consequently "the works" were completed, for by the "completion of the works" is meant the completion

(1) (1911) Reported in Hudson on Building Contracts, 4th ed., vol. ii., p. 456.

(2) [1919] 1 K. B. 491, 496.

of so much of them as he was bound under his contract to complete. Any other construction would lead to injustice, for if he had to defer commencing arbitration proceedings until after the building owner had chosen to get the works completed by another builder, the right to go to arbitration might be illusory.

[ATKIN L.J. The builder would not be deprived of all remedy, He would still have his remedy by action for work done and materials provided. It is only the right to go to arbitration that is suspended till after the completion of the whole works.]

BANKES L.J. It is with great regret that I have felt compelled to arrive at the decision which I am about to pronounce, for it seems plain upon the arbitrator's award and the affidavits that on the merits the builder is in the right and the building owner is in the wrong. But the only point that we have to decide is whether the learned judge below was right in giving the builder leave to enforce summarily an award that had been given in his favour. The only doubt that I at one time entertained in this matter was whether, having regard to the form of the contract, it might not be said that the parties, by giving the arbitrator power to deal with disputes arising on the construction of the contract, had empowered him to decide whether the works had been completed or not. But our attention was called to a case of *Pethick Brothers* v. *Metropolitan Water Board* (1), in which it was held by the Court of Appeal that where a right to go to arbitration depends on the happening of an event, the arbitrator has no jurisdiction to decide whether the event has happened. A finding therefore in the present case that the works were completed before the commencement of the arbitration was outside the jurisdiction of the arbitrator. The position is shortly this: there was a contract between these parties for the building of a certain number of houses, and the contract provided that the conditions in the schedule thereto should be construed as forming part of the contract. When we come to look at

(1) Reported in Hudson on Building Contracts, 4th ed., vol. ii., p. 456.

C. A. 1925

SMITH v. MARTIN.

Bankes L.J.

those conditions we find that throughout them the expression "the works" is constantly used as meaning the whole of the works contemplated by the contract, whether executed by the builder, or, in certain events, completed by the building owner through the employment of some other contractor. Thus Condition 1 provides that: "The works shall be carried out in accordance with the directions and to the reasonable satisfaction of the architect"—that is all the works. By Condition 4: "The contractor shall provide everything necessary for the proper execution of the works," meaning the whole of the works. Condition 9 provides that: "The contractor shall, at the request of the architect, immediately dismiss from the works" any person who is incompetent or misconducts himself, clearly referring to the whole of the works. And particularly is this clear in Condition 26, which provides that in the event of the builder being in default "the employer shall take such steps as in the opinion of the architect may be reasonably necessary for completing the works," that is completing the works by other persons after the builder has ceased to have anything to do with them. It is by the light of those earlier conditions that we must read the arbitration clause, Condition 32, on which the present question turns. That condition provides that any dispute or difference arising between the parties is to be referred to arbitration, subject to this, that "such reference, except on the question of certificate"—that is the withholding of a certificate by the architect to which the builder claims to be entitled, and this is not such a question—"shall not be opened until after completion or alleged completion of the works" unless with the written consent of the parties. As it is not in dispute here that the whole of the buildings contracted for have not been completed, the arbitration was premature. This construction of the contract may operate hardly upon a builder, who may be kept out of money which is justly due to him for an unlimited time, unless he takes other steps to secure payment; but he has chosen to agree to this contract, and we cannot do otherwise than act upon its plain meaning, and according to that plain meaning I think it is clear that

the arbitrator had no jurisdiction to make the award, and no leave ought to be given to enforce it summarily. The appeal must be allowed.

ATKIN L.J. I also regret, under the circumstances, that I have to agree. The question turns upon a contract in the ordinary form of the Institute, and upon the well-known arbitration clause in that contract. To my mind it is quite plain as a matter of construction that by the expression "completion of the works" in that clause is meant the completion of the whole of the works which are the subject matter of the contract, whether they are completed by the original contracting party or by anybody else. That that is the sense in which those words are used throughout the contract is plain from the several conditions to which my Lord has referred, to which I may add Condition 17, which provides that "any defects shrinkage or other faults which may appear within three months from the completion of the works" are to be made good; while the reference in Condition 26 to the employer engaging "any other person to complete the works" in the event of the builder neglecting to proceed with them, and the provision that "upon the completion of the works the architect shall certify the amount of the expenses incurred . . . . in completing the works by other persons," leave the matter beyond doubt. It is said that this works a great hardship upon a builder who has properly determined the contract under Condition 31 in consequence of the employer's refusal to honour his own architect's certificate. It may be that it does, but on the other hand the very experienced persons who drew these conditions may have thought that, on the whole, it was better not to make an exception to meet the case. The condition empowers the contractor in the event of his determining the contract "to recover from the employer payment for all work executed," and it may very well be that the arbitrator, in estimating the value of the work executed, might have to take into account matters which could not be finally determined till after the completion of the whole works. For instance, there might be defects in

C. A. 1925

SMITH v. MARTIN.

Atkin L.J.

the work executed the importance of which it would be difficult to gauge until after completion, and for that reason the draftsman of the conditions may have thought it advisable that there should be only one arbitration.

It being admitted that in this case the whole of the works contracted for had not been completed at the time this arbitration took place, the arbitration was contrary to the provisions of the contract and without authority. For these reasons it appears to me impossible to allow the award to be summarily enforced.

Appeal allowed.

Solicitors for the appellants: *Lake & Son.*

Solicitors for the respondent: *Simon, Haynes, Barlas & Ireland.*

J. F. C.

C. C. A. 1925 *March* 16.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* LEWIS MORGAN.

Criminal Law—Indictment—Prisoner committed for Trial for a certain Offence—Indictment preferred in respect of another Offence—Evidence in Depositions in Support of such other Offence—Leave of Judge not obtained—Vexatious Indictments Act, 1859 (22 *&* 23 *Vict. c.* 17), *s.* 1—*Criminal Law Amendment Act,* 1867 (30 *&* 31 *Vict. c.* 35), *s.* 1.

Where a person has been committed for trial for one offence a fresh indictment cannot be preferred against him in respect of another offence, which comes within the Vexatious Indictments Act, 1857, without the leave of the Court, even though such fresh indictment is founded on facts disclosed in the depositions.

APPEAL against a conviction at Cardiff Assizes.

The appellant, Lewis Morgan, and another person named Ball were committed for trial upon a charge of conspiracy to defraud the Patent Development Syndicate by obtaining goods by false pretences.

At the assizes a bill was preferred to, and found by, the grand jury, which charged the appellant and Ball with the offence for which they were committed for trial—namely,

conspiracy to defraud the Patent Development Syndicate by obtaining goods by false pretences. This indictment was not proceeded with, but remained on the file.

A second indictment was also preferred against the appellant, which charged him with obtaining the sum of 1*l.* 16*s.* from the Patent Development Syndicate by false pretences. No application was made at the assizes for leave to prefer this indictment or to add further counts to the indictment in respect of the charge for which he was committed for trial.

The second indictment against the appellant, which was founded on facts disclosed in the depositions, was proceeded with, and he was convicted and sentenced to six months' imprisonment.

At the trial material correspondence was proved by the production of copies of letters, although no notice to produce the originals had been given.

R. G. S. Bankes for the appellant. The appellant was not convicted upon a proper indictment. He was committed for trial upon a charge of conspiracy to defraud, but at the assizes he was tried upon an indictment for obtaining money by false pretences and not upon an indictment for the charge upon which he was committed for trial. Under the Vexatious Indictments Act, 1859, s. 1, a bill of indictment for obtaining money by false pretences cannot be presented to or found by a grand jury unless the prosecutor has been bound over to prosecute or unless the person accused has been committed to or detained in custody or has been bound by recognizance to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence shall be preferred with the consent in writing of the judge. None of those conditions were complied with in the present case. No application was made to the Court for leave to prefer a fresh indictment against the appellant, and no leave was given. Further, improper evidence was tendered at the trial. Material correspondence was proved by copies without notice to produce the originals having been given.

[He was stopped.]

C. C. A. 1925

REX v. LEWIS MORGAN.

Bertram Long for the Crown. The Criminal Law Amendment Act, 1867, allows a fresh indictment to be preferred against the accused person for an offence mentioned in the Vexatious Indictments Act, 1859, without the leave of the Court, if it be founded upon facts disclosed in the depositions, as well as allowing the addition of a new count to the indictment for the offence for which the accused person was committed for trial. It was held in *Rex* v. *Mosley* (1) that counts for offences within the Vexatious Indictments Act, 1859, may be added to the indictment without the leave of the Court where they are founded on facts disclosed in the depositions. In the present case the facts deposed to in the police court supported a charge of false pretences as well as a charge of conspiracy. If a count for false pretences had been added to the indictment containing the count for conspiracy it would have been ordered to be tried separately.

The judgment of the Court (LORD HEWART C.J., ROWLATT and SWIFT JJ.) was delivered by

LORD HEWART C.J. This appellant was convicted at the Cardiff Assizes upon a charge of obtaining money by false pretences, and was sentenced to six months' imprisonment, and he now appeals against his conviction.

The substantial point in the appeal, which is one not raised by the notice of appeal, arises under the Vexatious Indictments Act, 1859, and the Criminal Law Amendment Act, 1867. The appellant was committed for trial upon a charge of conspiracy to defraud. At the assizes an indictment was preferred against him in respect of that charge. A second indictment was also preferred against him and found by the grand jury for obtaining money by false pretences. The second indictment was founded upon facts disclosed in the depositions, but no application for leave to prefer that indictment was made to the Court nor was any leave granted. The appellant was tried upon the second of the two indictments and convicted. It was held by this Court in *Rex* v. *Mosley* (1) that counts for offences within the Vexatious Indictments

(1) [1924] 2 K. B. 187.

Act, 1859, may be added to the indictment without the leave of the Court where they are founded on facts disclosed in the depositions. No case has, however, gone the length of deciding that a fresh indictment can be preferred in respect of an offence within the Vexatious Indictments Act, 1859, against an accused person, even although it is based upon facts disclosed in the depositions.

More than that, crucial correspondence was proved at the trial by the tender in evidence of copies of letters, although no notice to produce the originals had been given. There are therefore two serious objections to the way in which the trial of this appellant was conducted, (1) he was tried upon an indictment upon which he ought not to have been tried, and, (2) matters were admitted which were not admissible evidence. The appeal must therefore be allowed.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

1925
March 19.

PHILLIPS *v.* HALLAHAN.

Landlord and Tenant—Rent Restriction—Part of House let separately for Business Purposes—Applicability of Act—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 2, 6.

The landlord of premises, which consisted of a shop on the ground floor with a dwelling-house above, let both portions, when they became vacant in 1923, to a tenant, but under separate lettings. As regards rent the premises came within the scope of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:—

Held, that the shop portion of the premises while so let separately was not within the protection of the Act.

Scope of s. 12, sub-s. 6, of the Act considered.

Williams v. *Perry* [1924] 1 K. B. 936 applied.

Appeal from Wrexham County Court.

The plaintiff, the landlord of premises, which consisted of a shop on the ground floor, with a dwelling-house above, claimed to recover possession of the shop.

The premises in question, which, as regards rent, were within the scope of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, had since 1914 been sometimes occupied as a whole, and at other times the dwelling-house portion and the shop portion had been let separately. In 1923 the landlord, who had obtained possession of the whole premises, let both portions, the dwelling-house and the shop, to a tenant, the present defendant, by separate lettings. In October, 1924, the landlord gave the tenant notice to quit in respect of the shop, but he, contending that his tenancy was protected by the Act of 1920, declined to give up possession. Thereupon the landlord took these proceedings to recover possession.

The deputy county court judge gave judgment for the tenant upon the ground that the landlord could not by merely letting separately a portion of the premises as a shop take that portion out of the protection of the Act, and he held that the shop remained within the protection of the Act.

Austin Jones for the landlord. The deputy county court judge was wrong in holding that the shop, which was let

separately from the dwelling-house portion of the premises, was within the protection of the Rent Restrictions Act, 1920. In *Williams* v. *Perry* (1) it was decided that where premises are let solely as business premises they are taken out of the protection of the Act. There it is true the premises as a whole were so let, while here only a portion was let as a shop, but this difference does not constitute a distinction in principle in view of the separate letting of the house and the shop.

[He also cited *Ellen* v. *Goldstein* (2); *Phillips* v. *Barnett* (3); and *Prout* v. *Hunter*. (4)]

Goodman Roberts for the tenant. The cases relied upon for the landlord show that premises may be taken out of the protection of the Act where there has been a substantial alteration in their character. But in this case there has been no alteration in the character of the premises. *Williams* v. *Perry* (1) is distinguishable. There the premises, which at one time were let as a dwelling-house, were afterwards let as a whole solely as business premises, and it was held that they were taken out of the protection of the Act. Here the house and shop are really one set of premises; their identity has never been altered during the material period. Sub-sects. 2 and 6 of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (5) consequently apply.

[He referred to *Epsom Grand Stand Association* v. *Clarke*. (6)]

BANKES L.J. This appeal raises a point which does not seem to have come before the Court precisely in this form, although I think it is covered by the language of the Act

(1) [1924] 1 K. B. 936.
(2) (1920) 89 L. J. (Ch.) 586.
(3) [1922] 1 K. B. 222.
(4) [1924] 2 K. B. 736.
(5) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2: (ii.) "The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes."

Sub-s. 6: "Where this Act has become applicable to any dwelling-house . . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies."

(6) [1919] W. N. 170.

1925

PHILLIPS v. HALLAHAN.

Bankes L.J.

and by the decisions given upon it. The landlord claimed to recover possession of a shop which she had let to the tenant. To that claim the tenant answered that the shop was within the protection of the Act, because it and the rooms above it constituted a house which at one time was within the Act, and as there had been no structural alteration of the premises it was said that they were still within the protection of the Act. The deputy county court judge accepted that contention, because in his view, to take the shop out of the protection of the Act, there must be some reconstruction of the premises by virtue of which the shop ceased to be part of the house and the original premises lost their identity.

The history of the premises appears to be this: In 1912 they consisted of some rooms on the first floor, and a shop on the ground floor, the whole premises being let at 28*l.* a year. In 1913 the then tenant let the shop to a man named Kingdon, but continued to occupy the dwelling-house above. We must assume that the shop was capable of being separately occupied, and was in fact separately occupied by Kingdon. Later, the original tenant bought the freehold and occupied the whole of the premises herself, both dwelling-house and shop, and of course at that time the premises were within the protection of the Act. But in 1920 she again let off the shop, continuing herself to reside in the upper part for a time; she then let that upper part to the tenant of the shop, but created two separate tenancies in respect of the two portions of the premises. By s. 13 of the Act of 1920 the shop was for a time within the protection of the Act, but that protection ceased from and after June 24, 1921. Early in 1923 the premises became vacant, and in January of that year the landlord, the present plaintiff, let the dwelling-house portion and the shop portion to a tenant, the present defendant, under separate tenancies. There was no agreement in writing, and there is nothing except the rent books to show the existence of the separate tenancies, and it was a question for the deputy county court judge to say whether the two separate lettings were a real or merely a colourable

transaction. The deputy county court judge has found that there was a bona fide separate letting of the house portion and of the shop portion, and we must deal with the case upon that footing. If the landlord had let the premises to two different tenants the position would be exactly the same as letting them separately to one tenant. In my opinion there is nothing in the Act to prevent a landlord, who has obtained possession of premises, part of which consists of business premises, letting off that portion as business premises, although if he had let the place as a whole it would have continued to be within the protection of the Act. The landlord may, if he chooses, turn the whole of his premises which are within the Act into business premises, and so take them out of the Act: *Williams* v. *Perry* (1) and if he may do that, it seems to me that he may turn part into business premises. If he does so, the Act no longer applies to that part of the premises, for, from that moment, it ceases to be a dwelling-house and becomes solely business premises. I think that is clear from the provisions of the Act, which apply to dwelling-houses only and not to business premises. Sect. 12, sub-s. 6, has no application where the dwelling-house, or a portion of it, has ceased to be a dwelling-house because it has become business premises. For these reasons the judgment of the deputy county court judge must be set aside and judgment entered for the landlord.

GREER J. I agree. The decisions in *Williams* v. *Perry* (1) and *Prout* v. *Hunter* (2) seem to me to cover this case. In the first of these cases it was decided that a landlord, if he gets possession, may convert the whole of his dwelling-house into business premises and so take them out of the protection of the Act, so long as they are used as business premises, notwithstanding the fact that there may have been no structural alteration. It seems to me to follow that if the landlord can do that with regard to the whole house he can do it with regard to a part of it; he can divide his house into separate dwellings or into a dwelling-house and business

(1) [1924] 1 K. B. 936. (2) [1924] 2 K. B. 736.

1925

PHILLIPS v. HALLAHAN.

Greer J.

premises. In *Prout* v. *Hunter* (1) it was decided that a landlord who has obtained possession can convert his dwelling-house into a furnished house, and by this means take it out of the protection of the Act. The interpretation of s. 12, sub-s. 6, is not quite a simple task, but I think it means that so long as premises are, and whenever they are, used as a dwelling-house the Act applies. If the landlord lets the premises for twelve months as business premises the Act does not apply to them, but if after the expiration of those twelve months the premises are again used as a dwelling-house the landlord would be bound by the Act, and could not say that because they had once been outside the Act by being business premises they are taken out of the Act altogether. I think that in such a case sub-s. 6 was intended to enable the tenant to say that inasmuch as the premises were a dwelling-house to which the Act applied before they became business premises, now that they had again become a dwelling-house the Act again applied to them. I think the deputy county court judge was wrong in holding that the landlord could not by letting separately a portion of the premises take that portion out of the protection of the Act. The landlord could not take the dwelling-house portion out of the Act, but in my view he could take the business portion out of the Act for the time being.

Appeal allowed.

Solicitors for landlord: *Speechly, Mumford & Craig, for J. Hopley Pierce & Bird, Wrexham.*

Solicitors for tenant: *Jaques & Co., for Allington Hughes, Bate & Newman, Wrexham.*

(1) [1924] 2 K. B. 736.

J. S. H.

END OF VOL. I.